

## **GUIDANCE ON IMPLEMENTING ACTIVITY AND USE LIMITATIONS**

### **Policy #WSC 14-300**

*This document is intended to guide parties conducting cleanups, Licensed Site Professionals (LSPs), attorneys, MassDEP staff, and others in the appropriate implementation of Activity and Use Limitations (AULs) as part of response actions conducted at disposal sites pursuant to M.G.L. chapter 21E and 310 CMR 40.0000, the Massachusetts Contingency Plan (MCP).*

*This document is intended solely as guidance. It does not create any substantive or procedural rights, and is not enforceable by any party in any administrative proceeding with the Commonwealth. The regulations related to AULs contain both specific and general requirements. This document summarizes these requirements and provides guidance on approaches MassDEP considers acceptable for meeting the general requirements set forth in the MCP. Parties using this guidance should be aware that there may be other acceptable alternatives for achieving compliance with general regulatory requirements.*

*Regulatory citations in this document should not be relied upon as a complete list of the regulatory requirements related to AULs. Parties implementing AULs should consult 310 CMR 40.0000.*

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Date

## **NOTE TO REVIEWERS:**

*The AUL Guidance was published by MassDEP in 1999 to assist parties conducting cleanups, LSPs, attorneys, MassDEP staff, and others in implementing Activity and Use Limitations. This public review draft updates the AUL Guidance by:*

- incorporating comments received on the 2011 AUL Guidance public review draft;*
- incorporating the 2014 MCP amendments; and*
- providing clarifications based on program experience, emphasizing AUL requirements related to the most common violations and frequently asked questions;*

*Please send written comments on the public review draft **by August 22, 2014** to Margaret Shaw, MassDEP/BWSC, One Winter Street, Boston, MA 02108; (617) 556-1092; or [Margaret.Shaw@state.ma.us](mailto:Margaret.Shaw@state.ma.us) .*

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## SECTION 1: INTRODUCTION

### 1.1 Background

The Massachusetts General Laws Chapter 21E (M.G.L., c. 21E) and the Massachusetts Contingency Plan (MCP), 310 CMR 40.0000, allow for a level of disposal site cleanup that takes into consideration the potential for exposure to oil and/or hazardous material (OHM) at and in the vicinity of a specific site. This potential is defined by the uses and activities occurring at a site and the nature and accessibility of the contamination. In this regard, the MCP provides three different approaches for characterizing risks posed by a disposal site and determining the necessary level of cleanup. Method 1 provides numeric soil and groundwater cleanup standards that MassDEP has developed for approximately 100 of the most common contaminants found at disposal sites. Method 2 allows for some modification of the Method 1 standards, based on site-specific conditions; and Method 3 provides for a site-specific assessment of the cumulative risks posed by a disposal site.

All of these methods involve assumptions about exposures to OHM at the site and use the “No Significant Risk of Harm” standard for determining the level of cleanup required to address human health, safety, public welfare and environmental risk. Exposures are determined from the conditions at and surrounding the disposal site, including the current *and future* uses of the properties.

M.G.L. c.21E, §3A(g) requires that sites be cleaned up to protect health, safety, public welfare and the environment for **any foreseeable period of time**. From experience we recognize that land uses can and do change over time, often in unpredictable ways. It is also fairly typical that some contamination will remain at a site even after completion of a cleanup that meets the MCP standards. To ensure that cleanups remain protective over time and through changes of land use, the flexibility provided by the MCP standards is accompanied by appropriate checks and balances on the assumptions used in the risk characterization to ensure that a condition of No Significant Risk will be maintained over time and through land use changes.

One of the checks and balances provided by the MCP takes the form of an **Activity and Use Limitation** or **AUL**. An AUL is a legal document that identifies site conditions that are the basis for maintaining a condition of No Significant Risk<sup>1</sup> at a property where contamination remains after a cleanup.

The authority of MassDEP to acquire interests in, to restrict use of, or allow the restriction of real property as a tool to ensure that oil and hazardous material are cleaned up adequately is found at M.G.L. c.21E, § 6. The AUL requirements set forth in the MCP and this guidance are intended to carry out the purpose of M.G.L. c. 21E, §6 and to ensure that AULs are prepared and recorded or registered in the same manner and with the same professional standards as other similar real estate instruments.

The MCP provides for three types of AULs:

- (1) Notice of Activity and Use Limitation ("Notice") [see 310 CMR 40.1074];

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<sup>1</sup> An AUL may be used as part of either a Temporary or Permanent Solution. The standard for a Temporary Solution is “No Substantial Hazard” and the standard for a Permanent Solution is “No Significant Risk,” as c.21E and the MCP define those terms. Unless otherwise specified, the term “No Significant Risk” is used for the purpose of readability throughout this guidance to refer to the disposal site cleanup standard related to the implementation on an AUL.



- (2) Grant of Environmental Restriction ("Grant") [see 310 CMR 40.1071]; and
- (3) Environmental Restriction [see 310 CMR 40.1073].

The Notice and the Grant are implemented and maintained by property owners, and the Environmental Restriction is imposed by MassDEP. Since the Notice is the most frequently used type of AUL, this guidance is primarily intended as a reference for parties who elect to implement a Notice. The requirements for implementing Grants are provided in Appendix J.

## **1.2 Guidance Applicability**

This guidance applies to disposal sites for which the implementation of an AUL is required to maintain a condition of No Significant Risk, pursuant to 310 CMR 40.0000.

This document is intended for Licensed Site Professionals, property owners, environmental consultants, risk assessors, attorneys, MassDEP staff and other professionals involved in developing, implementing, and maintaining AULs at disposal sites pursuant to M.G.L., c. 21E and the MCP, with the intent of clarifying the rules for AULs. This document does not create any substantive or procedural rights, and is not enforceable by any party in any administrative proceeding with the Commonwealth.

***This guidance should not be considered a substitute for specifically-tailored legal advice. Although AULs are implemented to meet the requirements of the MCP, an AUL is also a real estate document, subject to an entirely separate collection of practices, procedures, and requirements. Thus, property owners are advised to consult an experienced real estate attorney when considering or implementing an AUL.***

The guidance is organized as follows:

- *Section 1:* Purposes and application of AULs in the 21E program;
- *Section 2:* Relationship between AULs and the different MCP disposal site risk characterization methods;
- *Section 3:* Types of AULs and the elements which make up a complete AUL;
- *Section 4:* Requirements and guidance to consider when preparing an AUL;
- *Section 5:* Procedural requirements for recording/registering AULs; and
- *Section 6:* Requirements for maintaining a recorded or registered AUL, including addressing changes in site activities and uses.

## **1.3 Purposes of Activity and Use Limitations**

The major purposes of an AUL are:

- to provide property owners, interest holders in the property, and others who review property records at the Registry of Deeds with notice of the presence and location of OHM remaining at a disposal site and with a description of the disposal site conditions;
- to identify site uses and activities ("consistent uses" or "permitted uses") which would be consistent with maintaining a condition of No Significant Risk;
- to identify site uses and activities which should not occur in the future or should not occur without appropriate precautions ("inconsistent uses" or "restricted uses"), as they may result in the exposure of people at or near the disposal site to remaining

contamination and would be inconsistent with maintaining a condition of No Significant Risk; and

- to specify property owners' obligations (e.g., maintenance of caps or other barriers, monitoring of the area subject to the AUL, adherence to soil management plans) which ensure that the objectives of the AUL continue to be met.

#### **1.4 AULs and the Response Action Process**

AULs that are implemented as part of a Permanent or Temporary Solution may be implemented **only after completion of:**

- an adequate site assessment and risk characterization;
- a background feasibility evaluation in cases where remedial actions are necessary to achieve a Permanent Solution;
- the selection of the appropriate remedy for the disposal site; and
- all response actions necessary to achieve and support a condition of No Substantial Hazard or No Significant Risk for current site conditions within the area to which the AUL applies.

At sites where remedial actions (e.g., excavation, treatment or capping of contaminated media) are necessary or have been undertaken to reach a condition of No Significant Risk, the feasibility of approaching or achieving background concentrations of OHM at the disposal site must be evaluated before the property owner can elect to implement an AUL as part of the site remedy.

#### **1.5 Timing of the AUL and Permanent or Temporary Solution**

A Permanent or Temporary Solution that relies on an AUL is not considered valid unless the AUL is in effect, i.e., the AUL is recorded or registered at the appropriate Registry of Deeds [see 310 CMR 40.1070(3)] prior to the submission of the Permanent or Temporary Solution Statement to MassDEP. While an AUL must be implemented prior to the submittal of the associated Permanent or Temporary Solution Statement, the AUL should not be implemented until all response actions necessary to achieve a level of No Significant Risk for current site uses have been completed. For example, if a barrier is to be placed over the area subject to the AUL (e.g., the area is to be covered with clean fill and paved) to meet the No Significant Risk standard, then those response actions must occur **before** the AUL is recorded. The reason for this is two-fold: (1) the barriers do not serve to prevent exposure until they are in place; and (2) the AUL cannot delineate the location of barriers to be maintained until such barriers have been constructed.

The scope and content of an AUL is based on the level of cleanup performed at a site and the need to protect against exposure to remaining contamination. An AUL describes limitations on site uses and activities with respect to the level of cleanup achieved and the remaining risk. If, after a Permanent or Temporary Solution has been achieved, new uses and activities are considered at a site that do not fit into the AUL's "consistent uses" at a site, the MCP requires the evaluation of such new uses and activities by an LSP before they are implemented. Further, the completion of needed response actions and an amendment of the AUL may also be required before new exposures are created. These requirements are described in detail in Section 6 of this guidance.

## **1.6 Use of Deed Notices, Restrictions, or Other Measures that Are Not AULs**

Where an AUL is not otherwise required by the MCP [see 310 CMR 40.1012], a property owner may choose to provide notice to future interest holders of the existence of residual contamination on the property by imposing a restriction or a notice upon his or her property that is *not* an AUL (e.g., a “non-AUL” deed notice or restriction).

Such “non-AUL” notices or restrictions may be used to provide information about contamination at sites where a Permanent or Temporary Solution has not yet been achieved. For example, a “non-AUL” restriction or notice may be implemented as an interim measure when the more formal AUL is not yet appropriate, or as a voluntary notification of residual contamination at a site which has nevertheless attained a condition of No Significant Risk without the use of an AUL.

If the property owner chooses to use a non-AUL type of restriction or notice, such restriction or notice may not be used in lieu of, nor be represented as, an AUL pursuant to the MCP. In this regard, a “non-AUL” restriction or notice:

- shall not be used in place of an AUL required by the MCP to support a Permanent or Temporary Solution;
- should not be entitled “Grant of Environmental Restriction” or “ Notice of Activity and Use Limitation”;
- does not need to be submitted to MassDEP, but may be;
- does not need to adhere to the requirements for implementing AULs, including public notice, but may; and
- is not subject to MassDEP audits or enforcement.

Please note that an AUL may be implemented pursuant to the MCP to provide notice of residual contamination on the property even when such AUL is not required by the MCP [see Section 2.4.2 of this Guidance and 310 CMR 40.1012(3)]. Any such AUL must still comply with procedures established in 310 CMR 40.1070 through 310 CMR 40.1099, and would be subject to MCP audit and enforcement activities.

AULs and non-AUL recorded notices or restrictions are not the only mechanisms for providing information to individuals with potential for exposure to contamination remaining at a site. Depending upon the location of the contamination, its toxicity and potential routes of exposure, other measures for providing notice (e.g., posting signs or providing advisories to maintenance workers and others responsible for the physical management of the property) about the location and nature of the contamination should be considered. In particular, postings (in addition to measures to reduce access) may be appropriate at the perimeter of a disposal site that is in the process of assessment and remediation or at a location where people may have access to a contaminated surface water body for fishing or other recreational activities.

While not a requirement of the MCP, some property owners have also elected to post signs to alert site users that an AUL has been implemented at the property. The posting directs site users to consult the AUL for more information about the contamination and the permitted and restricted site activities and uses and related obligations.

## **1.7 Use of AULs at Disposal Sites Subject to Federal Superfund Program [310 CMR 40.0111(8)]**

Parties implementing remedies at disposal sites that have been deemed adequately regulated by CERCLA and are therefore not required to meet the requirements of the MCP may implement a Notice of Activity and Use Limitation when the remedy relies on the imposition of land use controls to minimize the potential for exposure to contamination. Implementation of such Notice of Activity and Use Limitation and any subsequent Amendments or Terminations of the AUL requires notification and approval from EPA and MassDEP, and must incorporate in full or by reference the land use control requirements set forth in the Record of Decision (ROD) or other plan approved by EPA.

In general, the AUL must meet the requirements of 310 CMR 40.1074, with a few exceptions set forth at 310 CMR 40.1070(4):

- AULs, Amendments and Terminations shall be prepared on a form provided for such purposes. The forms included at 310 CMR 40.1099 would not be used.
- The requirement to maintain a condition of No Significant Risk.
- The signature of an LSP is not required.
- The procedures at 310 CMR 40.1080 for evaluating contemplated changes to site uses and activities, and performing additional response actions after a Permanent Solution has been achieved are not required.
- The Public Involvement requirements at 310 CMR 40.1403(7).

Notices implemented at sites regulated by CERCLA are subject to enforcement through the MCP and M.G.L. c. 21E.

## **1.8 Oversight and Maintenance of AULs**

Remaining in compliance with the MCP requires that the current owner of a property for which an AUL has been recorded or registered continues to comply with the terms of the AUL. Violating the terms of the AUL is a violation of the underlying Permanent or Temporary Solution, which is in turn a violation of the MCP, and may result in penalty assessment or loss of the liability relief provided by M.G.L. c. 21E, §6. Section 6 of this Guidance addresses issues and procedures that apply once an AUL has been implemented, including: evaluating changes in site uses and activities with respect to an existing AUL; correcting and amending AULs; terminating AULs; referencing AULs in future deeds, lease agreements, and other instruments of transfer; MassDEP audits of disposal sites with AULs; and the consequences of violating the terms of the AUL.

## SECTION 2: AULS AND RISK CHARACTERIZATION

### **2.1 Introduction**

The MCP provides a risk characterization process, described in Subpart I [see 310 CMR 40.0900], to determine whether remedial action is necessary to achieve a level of No Significant Risk of harm to health, safety, public welfare or the environment. Except where site conditions are consistent with Background, it is necessary to perform a risk characterization for every site, although the level of detail and complexity of the analysis will vary depending upon the specific site conditions.

The risk characterization process determines when, in the absence of additional remediation, an AUL is needed to place limits on future activities and uses that could create exposures that would pose a significant risk. Unless it has been demonstrated that the site poses No Significant Risk for both current and reasonably foreseeable uses, an AUL is required to alert future owners, interest holders or interested parties that certain activities and uses may not be appropriate and protective of human health or the environment for the property, given the level of cleanup achieved. The AUL is necessary for the continued validity of the Permanent or Temporary Solution and to communicate the uses and maintenance obligations that ensure that the site presents No Significant Risk of harm to healthy, safety, public welfare or the environment over time.

The appropriateness and effectiveness of an AUL are functions of proper risk characterization of the disposal site. An AUL itself does not create a condition of No Significant Risk -- it is simply a tool used to provide notice of the presence of contaminants at the property and to describe the uses, activities and obligations necessary to maintain a condition of No Significant Risk.

### **2.2 Risk Characterization Steps**

The MCP identifies three methods (Method 1, Method 2, and Method 3) for characterizing risk. Regardless of the method selected, the following steps are required for all risk characterizations:

- determine the contaminants of concern and their concentrations at the site;
- determine the extent of contamination;
- determine background concentrations for the site where appropriate;
- identify current and reasonably foreseeable uses;
- identify receptors;
- categorize soil and groundwater (based on location and exposure potential);
- quantify receptors' exposures; and
- characterize receptors' risks.

These steps are fundamental to conducting a risk characterization. A risk characterization concluding that the disposal site poses No Significant Risk of harm to health, safety, public welfare or the environment is inadequate if the information used in the assessment process is invalid or incomplete. Please consult the *Guidance for Disposal Site Risk Characterization (July, 1995)*, available <http://www.mass.gov/dep/service/compliance/riskasmt.htm> for a more detailed discussion regarding risk characterization.

### **2.3 Activity and Use**



To adequately evaluate potential exposures, the risk characterization must identify and describe the site activities and uses associated with the disposal site and the surrounding environment. The terms “activity” and “use” describe human actions that could result in exposure to OHM. The “use” of the property is a broad term related to the property itself (e.g., commercial, industrial, residential), while “activity” is a narrower term used to describe the actions of people at the property that could result in exposure (e.g., excavation, gardening).

### 2.3.1 Current Site Activities and Uses [310 CMR 40.0923(2)]

The risk characterization must always evaluate the current use of the site. Activities identified for the current site use must include those that are actually occurring, and those uses that are not occurring at the time of the evaluation, but may reasonably be expected to occur because they are consistent with the current use of the site and surrounding land use. These scenarios are used to determine who may potentially be exposed at the site and how frequently that exposure may occur. In the case where a disposal site is currently not being used (e.g., the property has never been developed or an existing facility has been closed and there are no plans to use the property), a “no use” scenario is not sufficient. The risk characterization must incorporate probable uses and those that are consistent with surrounding land uses for the property if it were occupied and in use. Parties should adopt a conservative approach when evaluating the potential for children and others to access a site.

Example: If a site currently has underground utilities, emergency excavation and repair of the utility lines is an activity *consistent with the current use* of the property and must be evaluated in the risk characterization.

Example: If a residential property is currently occupied by adults only, child residents must still be evaluated in the risk assessment. Children playing at a property in a residential setting is a site activity that is consistent with the current (residential) use of the property.

Example: If an undeveloped lot is adjacent to a residential neighborhood, it is reasonably likely that it will be used by young children more frequently (e.g., as an impromptu ball field) than a similar property adjacent to an industrial park. Although the frequency of the activities associated with the current use of the property may not necessarily equal that of an official park or ball field, the current use risk characterization should still reflect this likelihood based on surrounding land use [310 CMR 40.0933(4)(a)].

Example: If an inactive industrial facility is located in or near a residential area, or an area zoned residential, the current use of the facility itself may not be residential, but the “current use” risk characterization needs to consider the potential for young children and others walking through or using the property (i.e., trespassers).

Example: If a former mill building is purchased with plans to convert the building to residential condominiums, a risk characterization of the residential exposure scenario must be completed. The risk characterization must include an evaluation of the *planned* residential use of the property.

AULs cannot be used to eliminate exposure pathways that are consistent with the current uses identified in the risk characterization. Absent additional remediation, only an *actual* change in the current use (resulting in a new, different current use) can eliminate such pathways from the evaluation.

### 2.3.2 Reasonably Foreseeable Site Activities and Uses [310 CMR 40.0923(3)]

Land use does not remain constant over time and it is difficult to predict with certainty the future uses for specific properties. As a starting point, the regulations presume unrestricted future use of the property. The reasonably foreseeable uses and activities of a site are defined in the MCP to include **"any possible activity or use that could occur in the future..."**, **unless those activities and uses are eliminated from future consideration by application of an AUL**. [See 310 CMR 40.0923(3)].

Reasonably foreseeable uses represent circumstances that are hypothetical. These conditions may not presently exist and might never occur. If the cleanup is not sufficient to support unrestricted use, then an AUL is required to identify the limitations on future use that are assumed in the risk characterization. Section 2.1 of the *Guidance for Disposal Site Risk Characterization* provides additional guidance on identifying the current and reasonably foreseeable use(s) of a site for the purpose of risk characterization to support a condition of No Significant Risk.

The MCP affords property owners wide latitude in identifying the reasonably foreseeable uses of their property, considered within the context of the surrounding community. The primary requirement of the MCP is that all reasonably foreseeable use(s) of the property be evaluated in the risk characterization or restricted in an AUL unless the property will be clean enough for unrestricted use.

Example: At an active manufacturing plant the owner has no plans to curtail operations. In order to close out an UST release, the current and reasonably foreseeable use of the site is identified as manufacturing and the AUL prohibits all activities and uses that would result in greater exposure (e.g., residential, school, daycare).

Example: A vacant former mill building abuts an industrial area and several homes, and the property owner has no specific plans for redevelopment. For the risk characterization, the property owner identifies reasonably foreseeable uses as including the building's former manufacturing use but not residential use even though both uses would be consistent with the site and the adjacent land uses. The AUL therefore includes a prohibition against residential use.

The risk characterization must include consideration of any activities and exposures consistent with the identified future use(s). AULs are not required if the property owner wishes to assume unrestricted use of the property, characterizes potential risks under conservative exposure assumptions (generally consistent with unrestricted use of the property), and, using these assumptions, concludes that No Significant Risk exists or was achieved. AULs are also not required for the exemptions provided in 310 CMR 40.1013, and described in Section 2.4.2.2 of this Guidance.

Example: A commercial property may currently have no potential for exposures associated with children playing on the property. However, it is reasonably foreseeable that the property use could change in the future, making these types of exposures possible. Such potential future exposures must be evaluated in the risk characterization unless specifically ruled out through the use of an AUL.

## **2.4 Summary of When AULs Are and Are Not Required [310 CMR 40.1012]**

The MCP specifies the conditions, based on the concentrations and location of OHM remaining at a disposal site and the risk characterization method, for which an AUL is or is not required. While the MCP carves out some exceptions, an AUL is generally required any time the Exposure Point Concentrations (EPCs) of OHM left on site exceed a level of No Significant Risk for unrestricted use of the site. Even when such contamination is at depth and therefore no exposure is currently likely, an AUL may be necessary to prevent activities in the future that would result in the uncontrolled excavation of, and human exposure to, contaminated soils. The conditions under which an AUL is required are summarized below.

### **2.4.1 When AULs Are Required [310 CMR 40.1012(2)]**

An AUL is required any time No Significant Risk has not been demonstrated for unrestricted site use. An AUL is specifically required by the MCP to address contamination left at the site in the following cases when:

- Method 1 or Method 2 is used to characterize risk and the soil EPCs do not meet the S-1 Soil Standards [Table 2 at 310 CMR 40.0975(6)(a)];
- Method 3 is used to characterize risk and assumptions are made in the risk characterization about restricting or limiting use of the property;
- OHM in soil at a depth greater than fifteen feet from the ground surface exceeds an applicable Upper Concentration Limit (UCL) in soil listed in the table at [310 CMR 40.0996(7)];
- a Permanent Solution relies upon an Exposure Pathway Mitigation Measure to prevent exposure to OHM that would otherwise pose significant risk;
- an existing private well has been removed from service as a drinking water supply, but is maintained for other uses such as irrigation, in accordance with the provisions of 310 CMR 40.0932(5)(d); and
- NAPL with Micro-Scale Mobility is present.

### **Exposure Pathway Mitigation Measures**

An Exposure Pathway Elimination Measures can be either “passive” or “active” remedial action that is directed at eliminating or reducing exposure to human or ecological receptors at the point of exposure. Passive Exposure Pathway Elimination Measures include barrier systems such as Engineered Barriers, geotextiles or geomembranes, crushed stone, and/or pavement that prevent direct contact with OHM. With respect to the indoor air pathway, Passive Exposure Pathway Elimination Measures include vapor barriers or passive venting systems that do not rely on electromechanical components (i.e., a subslab venting that does not rely on fans or blowers),

An Active Exposure Pathway Mitigation Measures or AEPMM is a type of Exposure Pathway Mitigation Measure that relies on mechanical or electro-mechanical components to actively prevent exposure to OHM that would otherwise pose a significant risk [see 310 CMR 40.1012(2)(b)]. AEPMMs would include a subslab depressurization system (SSD system) installed and operated to prevent the infiltration of volatile OHM into a building and point-of-entry treatment systems installed on a private water supply well.

When achievement of a Permanent Solution is dependent upon the maintenance of an Exposure Pathway Mitigation Measure, whether active or passive, an AUL is required to document that the



function/integrity of the measure/system must be maintained. In the case of a Passive Exposure Pathway Mitigation Measure, such as a vapor barrier, the AUL would provide notice that the barrier serves to prevent the infiltration of VOCs into the building, that any activity that would harm the integrity of the barrier should be avoided, and in the event that the barrier is breached (either intentionally as the result of construction or unintentionally as the result of damage or building settling, etc.), it must be repaired to ensure that a level of No Significant Risk is maintained/restored.

When achievement of a Permanent Solution relies on the ongoing operation of an AEPMM, specific requirements apply to both the operation and maintenance of the AEPMM and the contents of the Notice of Activity and Use Limitation [see 310 CMR 40.1025]. In such cases, Form 1075 must incorporate standardized Obligations and Conditions specific to the AEPMM. These Obligations and Conditions require that:

- the AEPMM be operated according to the regimen specified in the Permanent Solution Statement;
- remote monitoring technology be employed to alert MassDEP and the property owner and operator immediately upon shutdown of the AEPMM;
- immediate steps be taken to repair and return the AEPMM to operation if a shutdown occurs; and
- building occupants be notified if the shutdown lasts 30 consecutive days.

An AEPMM may be installed and operated at any point in the MCP response action process. MassDEP encourages, for example, installation of SSD systems to eliminate or reduce vapor intrusion to buildings as part of Immediate Response Actions, particularly when the affected building is a school, daycare or residence (i.e., where there is a Critical Exposure Pathway). AEPMMs may also be part of the remedy at disposal sites where a Temporary Solution or Remedy Operation Status has been achieved [see requirements at 310 CMR 40.1026]. An AUL is only required for AEPMMs, however, that are implemented as part of a Permanent Solution.

More information about the Exposure Pathway Mitigation Measures to address the vapor intrusion pathway and the operation of SSD systems as part of a Permanent Solution (i.e., as an AEPMM) can be found in the *Vapor Intrusion Guidance*, WSC-14-435.

#### NAPL with Micro-Scale Mobility

A Permanent Solution may be achieved at a disposal site where some NAPL remains in the environment, provided a level of No Significant Risk has been achieved, the NAPL has been removed to the extent feasible, and the NAPL is stable (does not exhibit an expanding footprint). Where the remaining NAPL exhibits “Micro-scale Mobility” such that it is visibly present in the subsurface (i.e., observable in an excavation, boring or monitoring well), then an AUL is required as part of the Permanent Solution.

The purpose of the AUL where there is NAPL with Micro-scale Mobility is to provide notice to the property owner about the presence of NAPL so that appropriate measures can be taken to manage future exposure to the NAPL (e.g., to protect construction workers and/or to establish management plans for any NAPL that may flow into future excavations in the event of construction activities in the area of the NAPL that exhibits Micro-scale Mobility). While the observation of a sheen on groundwater in a well or excavation technically indicates the presence of NAPL with Micro-scale Mobility, MassDEP would not expect the implementation of an AUL unless NAPL is observed in the subsurface at thickness greater than or equal to ½

inch. This lower limit is intended to focus AULs on conditions that are more likely to warrant measures to manage NAPL as the result of future excavation or other activities affecting subsurface conditions.

Please keep in mind that in order to achieve a Permanent Solution without an AUL, not only must NAPL remaining in the environment pose No Significant Risk, but any residual contamination in soil must be cleaned up to unrestricted use in order to avoid an AUL.

More information about LNAPL with Micro-scale Mobility may be found in *Light Nonaqueous Phase Liquid (LNAPL): Guidance for Site Assessment and Closure under the Massachusetts Contingency Plan*, WSC-14-###.

#### 2.4.2 When AULs Are Not Required [310 CMR 40.1012(3) and 310 CMR 40.1013]

The MCP describes several situations where an AUL is *not* required by the MCP, but may be implemented to provide notice to future interest holders of residual contamination left at the site. Implementing an AUL pursuant to the MCP, even if not specifically required by the MCP, must still comply with procedures established in 310 CMR 40.1070 through 310 CMR 40.1099.

##### 2.4.2.1 Sites with Permanent Solution with No Conditions or Temporary Solution [310 CMR 40.1012(3)]

The following scenarios constitute a Permanent Solution with No Conditions and therefore an AUL is not required to maintain a condition of No Significant Risk:

- Contamination in soil at levels at or below the UCLs is located at a depth greater than 15 feet below the ground surface, because future exposure and excavation to that depth is considered unlikely [see 310 CMR 40.1012(3);
- OHM concentrations are consistent with Natural Background, as that term is defined at 310 CMR 40.40.0006(12);
- Levels of OHM in soil have been reduced below applicable S-1 standards where risks are characterized using Method 1 or Method 2; and
- No Significant Risk has been achieved and no limitations on the site were assumed in the Method 3 Risk Characterization

Also pursuant to 310 CMR 40.1012(3), an AUL is not required when all substantial hazards have been eliminated and the requirements for a Temporary Solution have been met in accordance with 310 CMR 40.1050.

##### 2.4.2.2 Sites with Permanent Solution with Conditions that do not require AULs [310 CMR 40.1013]

An AUL is not required where a Permanent Solution with Conditions is based solely on particular limitations, assumptions, or conditions at the site that are specified at 310 CMR 40.1013 and described below.

#### GW-2 standards exceeded at the site with no occupied building [310 CMR 40.1013(1)(d)]

When OHM levels in groundwater exceed GW-2 standards at a disposal site that is not currently categorized as GW-2 (i.e., there are no occupied buildings on the property), the MCP does not require an AUL be implemented to address the potential for vapor intrusion if a building were constructed at the property in the future [see 310 CMR 40.1013(1)(d)]. However, an AUL may be used to provide future owners or developers with notice of the potential risks associated with site development and to establish limitations on site activities and uses related to the potential for vapor intrusion or conditions for the construction of future buildings to ensure that the plans incorporate measures that prevent vapor intrusion.

An AUL in such cases may be used to specify measures to be taken at the time of building construction to prevent vapor intrusion impacts. Such measures may include the installation of vapor barrier, SSD system, passive venting system, subsurface parking facility or limiting construction to locations outside of areas with groundwater VOC contamination.

More information related to AULs implemented to address vapor intrusion at future buildings can be found in the *Vapor Intrusion Guidance*, WSC-14-435.

#### Public Ways or Rail Right-of-Ways [310 CMR 40.1013(1)(c)]

AULs are not required beneath a public way or rail right-of-way since the potential for future exposure to or excavation into contamination at that depth or in those locations is considered minimal. Note, while public ways and rail rights-of-way do not require AULs, owners of these lands are required to meet all other cleanup requirements, including cleanup of contamination in areas that are outside the legal bounds of the public way or rail right-of-way. Further, the AUL exception for a public way or rail right-of-way is limited to the lands within the transit corridor; it does not extend to ancillary land contiguous with the public way or rail right-of-way (e.g., garages or other maintenance facilities associated with the transit corridor, but not within it).

#### Residential Gardening [310 CMR 40.1013(1)(a)]

An AUL is not required to address residential gardening exposures in situations where the Risk Characterization demonstrates No Significant Risk for residential direct contact exposures to site soils. Best Management Practices are recommended for non-commercial gardening in a residential setting to minimize and control potential risk, pursuant to 310 CMR 40.0923(3)(c).

#### Anthropogenic Background Levels are achieved [310 CMR 40.1013(1)(b)]

AULs are not required to address residual contamination that meets the definition of Anthropogenic Background, in accordance to 310 CMR 40.0006. The MCP defines Anthropogenic Background as the level of OHM resulting from any of the following sources that would exist in the absence of the disposal site:

- atmospheric depositions of industrial process or engine emissions;
- Historic Fill, as defined at 310 CMR 40.0006;
- sources specifically exempt from the definition of disposal site or release;
- groundwater releases from a public water supply system; or
- petroleum residues incidental to normal operation of motor vehicles.

### 2.4.3 Prohibited Uses of AULs [310 CMR 40.1012(4)]

An AUL cannot be used in lieu of achieving an applicable Method 1 or Method 2 standard for current use. For example, when using Method 1, if the soil is categorized as S-2 and the calculated EPCs exceed S-2 standards, cleanup to meet the S-2 level is needed to achieve a Permanent Solution [see 310 CMR 40.0970]. The implementation of an AUL does not negate the requirement to meet the applicable standards. Specifically, an AUL cannot be used to:

- justify a conclusion of No Significant Risk when using Method 1 or 2 if an applicable standard is exceeded; or
- change the category of groundwater categorized as GW-1 or GW-2 (except as provided in 310 CMR 40.0932(5)(d) with respect to existing private wells).

## **2.5 AULs and the Risk Characterization Methods**

The MCP's risk characterization methods are used to determine whether a level of No Significant Risk exists or has been achieved for current and reasonably foreseeable uses of the site. AULs can be used with all of the three MCP risk characterization methods (Methods 1, 2 or 3).

### 2.5.1 Method 1 [310 CMR 40.0970]

Method 1 is the simplest approach to characterizing risk at a site. In a Method 1 risk characterization, EPCs at the site are compared to promulgated standards for soil and groundwater. The Method 1 Standards were developed for three broad categories of sites. The standards represent a template for a certain type of site. For example, the Method 1 S-1 Standards are designed to be protective of unrestricted land use and activities.

The Method 1 Standards can only be used alone if the contamination is limited to soil and/or groundwater (i.e., it cannot be used to address contamination in sediments or indoor air). By selecting Method 1 to characterize risks at the site, a party accepts the exposure and other assumptions used in the development of the Method 1 Standards. Method 1 does not provide flexibility to modify the exposure assumptions used by MassDEP to develop the standards.

If the applicable Method 1 soil standards are exceeded, a party must either remediate the site to a point that the calculated EPCs meet the Method 1 levels, or demonstrate using a Method 2 or 3 risk characterization that the contaminant levels do not pose a significant risk. A Method 2 or 3 risk characterization may also indicate that contaminant levels require remediation. A more detailed discussion of Method 1 is provided in the MassDEP's *Guidance for Disposal Site Risk Characterization, Section 5.0*.

### 2.5.2 Method 2 [310 CMR 40.0980]

A Method 2 risk characterization allows for limited modifications of some of the existing Method 1 Standards, as well as the development of standards for soil and groundwater for chemicals for which a Method 1 standard does not currently exist. A Method 2 risk characterization uses site specific information to modify the fate and transport assumptions in the Method 1 standards. The Method 2 equations are provided at 310 CMR 40.0983 and 40.0984 for soil and groundwater, respectively. Once the new or modified standards are developed using Method 2, the risk characterization is conducted in accordance with the rules for a Method 1 assessment. Under Method 2, exposure assumptions, such as the type of receptor or the duration of exposure, cannot



be modified; a Method 3 risk characterization is necessary to change exposure assumptions. A more detailed discussion of Method 2 Modifications is provided in the *Guidance for Disposal Site Risk Characterization, Section 6.0*.

### 2.5.3 Method 3 [310 CMR 40.0990]

A Method 3 risk characterization is a site specific approach that determines cumulative site risk and considers the risk management criteria described in 310 CMR 40.0990. As described in Section 2.3 above, all risk characterization methods must evaluate both current and reasonably foreseeable uses of the site and its surrounding area. When using a Method 3 risk characterization, an AUL is required any time No Significant Risk relies on reduced exposure potential due to the restriction or limitation of Site Activities and Uses [310 CMR 40.1012(2)(a)(2)], unless an AUL is specifically not required. An AUL may *not* be used to eliminate current site uses or activities from consideration in the risk characterization [310 CMR 40.0923(4)(a)]. For example, access to surficial soil (upper 3 feet) at a residential property is considered a current use, so an AUL may not restrict this use unless there is a barrier in place (e.g., pavement or building). If a Method 3 risk characterization relies on a site-specific feature to prevent or mitigate exposures such as a building or pavement, those features must be identified on a survey plan (see Section 4.3). A more detailed discussion of Method 3 is provided in the *Guidance for Disposal Site Risk Characterization, Section 9.0*.

Regardless of the risk characterization method selected, a level of No Significant Risk must exist or be achieved for a site to meet the requirements of a Permanent Solution.

## **2.6 AULs by Medium – Soil, Groundwater, and Sediment**

Compliance with the terms of an AUL ensures the assumptions about the stated site use and corresponding exposure limitations remain valid into the future. The media in which contamination is present often determine the routes and likelihood of exposure, and thus there are several media-specific considerations for AULs. The MCP risk characterization process further requires that some media be categorized based on the likely receptors at the site (e.g., whether children might be using a site intensely and playing in soil). Examples of AULs by medium and risk characterization method are available in Section 2.8. These medium-specific exposure assumptions and method-specific considerations are described in more detail below.

### 2.6.1 Soil Contamination

Under the MCP, soils are placed into one of three categories based on potential for exposure: S-1, S-2, and S-3. The soil categories are broad because the specific exposure factors for each category were designed to describe a range of potential exposure situations commonly found at disposal sites. Regardless of the risk characterization method used, site soils must be categorized to evaluate exposure.

The Soil Category S-1 includes land used for residential or active recreational purposes where frequent and intense direct contact exposures are likely. When conducting a Method 1 or 2 risk characterization at a site where S-1 standards are applicable, the disposal site EPCs are compared to the appropriate standards. The Method 1 or Method 2 S-1 standards are based upon a residential exposure scenario in which a potential receptor comes into contact with the contaminated soil while playing or gardening, and includes active recreational areas such as playgrounds. Using Method 1 or 2, an AUL is not required if the disposal site EPCs are equal to or

less than the Method 1 or Method 2 S-1 standards. The exposures assumed from ingestion and dermal contact with contaminated soil represent levels acceptable for unrestricted use and thus are considered to be protective for all potential site uses. Similarly, if a Method 3 risk characterization for a residential scenario finds No Significant Risk to human health at a site, those soils are acceptable for unrestricted use under the MCP, and no AUL is required.

The Soil Category S-2 includes land used for commercial and passive recreational uses, where a person could come into contact with contaminated soil in a work environment or during passive recreational activities such as walking, bird watching, or picnicking. The exposures accounted for in the S-2 Method 1 or Method 2 standards include incidental ingestion and dermal contact with contaminated soil during the warmer months. When conducting a Method 1 or 2 risk characterization at a site where S-2 standards are applicable, the disposal site EPCs are compared to those standards. Whenever the EPCs are equal to or less than the applicable S-2 (Method 1 or 2) standards, but exceed the S-1 standards, either remediation or an AUL is required. This is because of the limits on receptor exposure assumed with the S-2 soil category, and these limits must be documented in an AUL. Similarly, when a Method 3 risk characterization determines No Significant Risk for exposure scenarios like recreation as the most sensitive reasonably foreseeable use at the site, all more sensitive scenarios must be prohibited by the AUL.

The Soil Category S-3 is based upon a person coming into contact with contaminated soil during a short but intense exposure, such as excavation work. The exposures considered in the Method 1 or Method 2 S-3 standards are incidental ingestion and dermal contact with contaminated soil during the warmer months as would be experienced in construction work. When conducting a Method 1 or 2 risk characterization at a site where S-3 standards are applicable, the disposal site EPCs are compared to those standards. Whenever the EPCs are equal to or less than the applicable S-3 standards, but exceed the S-1 standards, an AUL is required. This is because like S-2, the S-3 soil category assumes limitations on receptor exposure.

Further details about soil categories, exposures, and AUL considerations are provided in the following sections on site specific activities. This includes a more in-depth look at common soil questions in residential and construction use scenarios.

## 2.6.2 Groundwater

The MCP limits the use of AULs for groundwater contamination. AULs are specifically required for groundwater as described in 310 CMR 40.0932(5)(d): to provide notice that an *existing* private water supply well is not suitable for future use as a potential drinking water supply. The Notice of AUL required in this case may only be used after the property supplied by the well is tied into a public drinking water supply. The groundwater, as a result, can be eliminated from consideration as a current drinking water source area as detailed in 310 CMR 40.0932(5)(d). Provided these requirements are met, the well may be maintained for non-potable uses as long as those uses meet a level of No Significant Risk.

AULs may also be necessary to ensure the maintenance of Exposure Pathway Mitigation Measures that are installed and maintained to prevent exposure to OHM in groundwater [see 310 CMR 40.1012(2)(b)], such as a passive subslab venting system and vapor barrier, to prevent the migration of volatile contaminants from the groundwater into an existing building. In such instances, the AUL ensures that the system will remain in place and intact so that it will continue to function effectively in preventing exposure. See 310 CMR 40.1025 and the Vapor Intrusion

Guidance, WSC-14-435 for guidance on implementing AULs when Exposure Pathway Mitigation Measures are relied upon to maintain a Permanent Solution.

AULs are not required to prevent installation of future private drinking water wells in areas where groundwater exceeds the GW-1 standards. In the case of *new* private water supply wells, local Boards of Health have the authority to ensure that such supplies are potable and are not installed in or drawing upon contaminated groundwater. The MCP does not provide a separate regulatory check on potential exposure to groundwater contamination via new private water supply wells.

All Method 1, 2, and 3 risk characterizations require that the exposure scenarios developed for the risk characterization be consistent with the groundwater categories. The MCP states that AULs may not be used to change the category of groundwater categorized as GW-1 or GW-2, and may not be used to justify a conclusion that a condition of No Significant Risk exists at sites characterized using Method 1 or 2 if an identified EPC exceeds applicable standards [see 310 CMR 40.1012(4)(1)].

The limited application of AULs to groundwater rests on several considerations. Because contamination in groundwater migrates over time, providing an accurate description of the affected area of groundwater as part of an AUL is problematic because the boundaries can be expected to change. Further, because groundwater migration does not respect property boundaries, AULs for groundwater in many cases would entail the need for an AUL for each of the affected properties to restrict access/exposure to contamination in groundwater; implementing multiple AULs in such cases would be complex, difficult, and often impractical. Finally, the installation of new public and private drinking water supply wells is otherwise regulated on the state and local level to ensure that such wells provide safe drinking water. An AUL to prohibit well installation at a property without an existing water supply well is therefore deemed duplicative.

### 2.6.3 Sediment

AULs are used infrequently at sites where sediments have been contaminated. This is because sediment is an essential medium for ecological receptors, and an AUL cannot be used effectively to limit ecological exposure. Additionally, where access rights exist, exposures associated with that access must be evaluated under the current use scenario. For example, a river must be cleaned up to protect activities that are authorized by federal and commonwealth statutes, such as navigation, swimming and fishing. An owner of land adjacent to a surface water body cannot use an AUL to restrict access to contaminated sediment if people could be exposed to it while exercising riparian rights such as navigation, swimming and fishing. As with any AUL, access can only be restricted by the property owner, subject to any easement rights.

In limited cases, an AUL may be appropriate for sites where a sediment cap is part of an implemented remedy. An AUL may be used to document the presence of the sediment cap, require that the cap remain in place, and specify obligations for the monitoring and maintenance of the cap. The AUL cannot, in such cases, restrict access. The appropriateness of an AUL for a sediment cap would be dependent upon site-specific conditions, including factors such as ownership of the sediments, other state permit requirements, access rights, and the responsible party's continued ability to monitor and maintain the cap.

## **2.7 AULs and Specific Site Activities**

### **2.7.1 Residential Use**

Residential use is often the scenario that presents the most risk in a risk characterization, because of the presence of sensitive receptors and the intensity of use at the site. AULs may be used in certain circumstances with respect to residential use. AULs to address residential use include an AUL that prohibits residential use altogether, or an AUL that limits direct contact exposure to soil at residential sites.

**AUL to Prohibit Residential Use** – In the absence of an AUL, residential use must be considered a current or reasonably foreseeable use at almost all sites. This is because the reasonably foreseeable uses and activities of a site are defined in the MCP to include "**any possible activity or use** that could occur in the future...", **unless those activities and uses are eliminated from future consideration by application of an AUL.** [See 310 CMR 40.0923(3)].

Even an industrial property in an area zoned industrial may be rezoned and redeveloped as condominiums or other types of residences. If residential use is not a current use, as defined at 310 CMR 40.0923(2), then an AUL may be implemented to prohibit such use in order to limit associated exposure pathways, and the exposure pathways would not need to be evaluated in the risk characterization.

**AULs to Limit Direct Contact Exposure to Soil at Residential Sites** - An AUL may be used in some cases to limit certain activities associated with soil exposures in residential settings. Generally, AULs limiting soil exposures in residential settings are used to ensure that a barrier to direct contact remains intact and effective into the future. Such barriers include buildings, pavement, and/or other structures designed as a pathway elimination measure. For example, if an existing building foundation prevents dermal exposure to contaminated soil, an AUL would specify that the basement floor and foundation remain in place and be maintained as a barrier to dermal contact with underlying soil contamination.

AULs may be used to limit direct contact to soil in conjunction with Method 1, Method 2 and Method 3 risk characterizations. Conditions under which AULs are appropriate are more limited when Method 1 or 2 are applied.

Method 1 can be used to demonstrate a condition of No Significant Risk from soil contamination on a residential site if (a) OHM concentrations in soil beneath permanent structures do not exceed S-3 standards, (b) OHM concentrations in soil beneath pavement do not exceed S-2 standards, and (c) OHM concentrations in accessible soil (to a depth of 15 feet) do not exceed S-1 standards. An AUL would be necessary to ensure the long-term effectiveness of any direct contact barrier beneath which OHM concentrations exceed S-1 Standards.

Method 2 may be used in residential settings to incorporate site-specific conditions in the leaching model. Under Method 2, the allowable soil concentrations for a given soil category may be higher than the Method 1 Standards, but may not exceed the applicable MCP Direct Contact Soil Concentrations listed at 310 CMR 40.0985(6). As is the case for Method 1, soil under pavement may be categorized as S-2, and soil under buildings may be categorized as S-



3, but an AUL is required to ensure that the building or pavement remains intact and effective as a barrier to direct contact.

Method 3 can be used to demonstrate a condition of No Significant Risk from soil contamination on a residential site if (a) OHM concentrations beneath a barrier do not exceed UCLs, and (b) OHM concentrations in accessible soil (to a depth of 15 feet) do not exceed levels associated with MCP risk limits. When Method 3 risk characterization is used to demonstrate a condition of No Significant Risk, an AUL can be used with a wider range of contaminant concentrations than would be allowed under Method 1 or Method 2.

For example, a Method 3 risk characterization for a Senior Living Facility might show No Significant Risk at higher soil concentrations than would a risk characterization for an unrestricted residence with possible child residents. While children may visit formally restricted Senior Living residences, the exposure would be less frequent than a child resident and likely similar to that of a park visitor. The AUL would document the prohibition against child residents that was already formally restricted in the deed or other previous legal obligation and enforced by facility authorities. Any contemplated removal of the residency age restriction in the future would require a risk characterization that supported unrestricted use that includes child residents.

## 2.7.2 Utility Work Exposures

If the property has a utility line or easement, then at a minimum that area of the site must be cleaned up to a level that poses No Significant Risk for emergency repair workers. Utility repair work should be evaluated as a *current* use in a risk characterization of the property. An AUL cannot be used to limit activities and exposures consistent with current use.

Where underground utilities exist, exposures associated with emergency repair work of existing subsurface utilities by workers without personal protective equipment must be evaluated under the current use scenario, pursuant to 310 CMR 40.0923(2). Utility worker risk assessment should focus on exposures associated with acute, non-cancer effects. Due to the short-term nature of the exposure, it is not necessary to evaluate potential cancer risk for utility repair work. The exposure routes in this scenario include direct contact and incidental ingestion of contaminated soil, inhalation of particulates, and inhalation of vapors associated with either contaminated soil or groundwater. The risk characterization for utility work should also consider the potential for explosive vapors as a risk of harm to public safety.

Where a Method 1 or a Method 2 risk characterization is performed, MassDEP does not require a separate Method 3 risk characterization to evaluate possible exposures to utility workers. S-3 standards are assumed to be protective of such exposures. Where a Method 3 risk characterization is performed, utility worker exposures should be considered, as appropriate. Regardless of the Method used, cleanup is required unless the risk characterization results indicate that a level of No Significant Risk exists for an emergency utility worker.

Where future utility construction is possible, an AUL may be used to preclude construction of utilities until measures to protect both utility construction workers and utility repair workers are in place. The AUL should indicate that prior to construction, a Health and Safety Plan be developed and implemented. The Health and Safety Plan should specify protections for construction workers from exposure to OHM that could pose a risk, consistent with Section 2.7.3. Conditions under such Plan must be such that exposure during future utility repair would pose No Significant Risk.

### 2.7.3 Construction, Excavation, and Health and Safety Plans

An AUL can be used to limit potential exposures related to excavation and construction, and will often include a requirement that a Health and Safety Plan be prepared to manage risk from potential exposure to OHM. The AUL should describe what activities warrant the implementation of a Health and Safety Plan (e.g., excavation) and identify whom the plan is intended to protect (e.g., workers and people residing on and near the site).

If a completed assessment of construction worker risk does not demonstrate No Significant Risk for workers, the AUL should document the requirement of a Health and Safety Plan to address that risk. A complete Health and Safety Plan does not need to be prepared at the time that the AUL is recorded, but the “Obligations and Conditions” section of the AUL should include a requirement to develop and use such a plan. The scope and objectives of the plan should be described in the AUL.

The AUL should specify that a site-specific Health and Safety Plan be prepared by a Certified Industrial Hygienist or other individual appropriately trained and/or experienced in the development of Health and Safety Plans. A general statement such as, “OSHA procedures will be used during excavation,” provides too little information as to what health and safety requirements are necessary at the site. OSHA guidelines for construction workers do not necessarily equate to a level of No Significant Risk at the site or incorporate risk management criteria consistent with the MCP. Stating that OSHA guidelines will be followed does not identify whether monitoring for off-site exposures is necessary (e.g., monitoring for particulates at the site boundary to guard against exposures to people other than those performing the excavation who are in the vicinity of the site). Unless it is documented that construction activities will not pose a risk to neighboring residents or others who might be exposed outside the site boundaries, the Health and Safety Plan should specify the monitoring of remedial activities necessary during any construction. All Health and Safety Plans should, at a minimum, be consistent with the health and safety procedural requirements of the MCP [310 CMR 40.0018].

### 2.7.4 Fences

Fences are commonly used as part of an Immediate Response Action or Release Abatement Measure (as part of a risk reduction measure) or as a Temporary Solution to restrict access to contaminated soils. The risk characterization provision at 310 CMR 40.0923(5) cite the use fences as an example of a temporary risk reduction measure, stating that, “If the Site Activities and Uses considered in the Risk Characterization have been limited in any way by temporary risk reduction measure (e.g. fences which restrict access) ... the documentation of the Risk Characterization shall describe clearly and concisely the nature of all such limitations.”

While the use of a fence is not explicitly restricted as part of a Permanent Solution, the extent to which the Permanent Solution relies on the fence would be a consideration in evaluating the appropriateness of the remedy. Fences do not prevent transport of soils via wind or water, and are susceptible to damage from natural forces and trespassers. Therefore, fencing alone, with or without an AUL, is not sufficient or appropriate to prevent direct exposure. However, in combination with other measures that do prevent exposure to OHM, fencing may be an effective and appropriate component of a Permanent Solution. For example, a fence may be used to delineate the area of the AUL. In cases where a fence is relied upon as part of the Permanent Solution, the AUL must identify the maintenance of the fence among the conditions that ensure the maintenance of a level of No Significant Risk.

Example: Fencing with an AUL is used as part of a Permanent Solution at facility complex. The AUL also includes maintenance of pavement as a barrier to prevent exposure to soil in the fenced area and routine checks on the fence by the facility's security detail.

## **2.8 Common Exposure Assumptions and Related AUL Conditions**

As presented in previous sections, an AUL is based on the risk characterization method used and the medium from which exposure is being restricted. Table 2-1 provides general examples of common exposure assumptions, the media in which contamination remains, and an AUL condition that addresses that situation.

## **2.9 Risk of Harm to Safety, Public Welfare and the Environment**

Although AULs are primarily intended to address risks to human health, they may also be used to protect against activities or maintain remedies to address risks to safety, public welfare or the environment.

### **Risk of Harm to Safety**

An AUL could be used to condition or prohibit activities that could pose a risk of harm to safety. The risk of harm to safety is always a separate evaluation from the risks to health, public welfare, and the environment in accordance with 310 CMR 40.0960.

Example: An AUL could that provides for the maintenance of a cap to limit access to OHM concentration may also be used, although not required by the MCP, to prevent direct contact with physical hazards located in the area of OHM contamination (e.g., glass and large metal fragments) present at a site, or the AUL could also be used as part of a Temporary Solution to specify requirements for the maintenance of a fence to help control access to certain areas of a site where safety hazards exist as part of a Temporary Solution. (Note: as identified in Section 2.7.4, a fence alone should not be used as for part of a Permanent Solution where the maintenance of a condition of No Significant Risk relies upon the maintenance of the fence.)

### **Risk of Harm to the Environment**

The use of an AUL to address risk of harm to environmental receptors may be effective in limited cases. Clearly, an AUL specifying limits on animal use of the property is not realistic and should not be considered. However, when a remedial action, such as capping to prevent soil run-off to a wetland, is conducted to prevent risk of harm to the environment, it may be appropriate to include an AUL that establishes continuing obligations for maintenance of the cap and obligations to not interfere with its function.

### **Risk of Harm to Public Welfare**

An AUL to prevent risk of harm to public welfare may also be employed.

Example: A risk characterization may conclude that potential soil exposures do not pose an unacceptable risk of harm to human health, but the soil may have a strong odor or oily

residue that could cause a nuisance if the contaminated soil were placed in an area of unrestricted use that would be considered a risk to public welfare. An AUL could be applied in this case to guard against the excavation or relocation of soils without a Health and Safety Plan and a Soil Management Plan to an area where odors or residue could cause a nuisance.

## **2.10 Evaluation of Risks Associated with Changes in Uses and Activities**

An AUL is not necessarily a permanent limitation on future development of contaminated property. Where an AUL has been used to eliminate certain exposure scenarios at a site and the property owner later intends to change the site uses or conditions to uses or conditions which were not evaluated in the risk characterization or addressed by the existing AUL, an LSP must determine before the changes are implemented whether a level of No Significant Risk would continue to exist under the contemplated new uses or conditions, as described in 310 CMR 40.1080. In cases where proposed activities would not be consistent with a level of No Significant Risk, additional cleanup and the amendment or termination of the initial AUL and implementation of a revised AUL would be necessary before the proposed activities could occur. (See *Section 6* for the requirements related to a change in property use after an AUL has been implemented).

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**Table 2-1: EXAMPLES OF COMMON EXPOSURE ASSUMPTIONS AND AUL CONDITIONS**

Media	Risk Characterization Method	Conditions	Exposure Assumptions	AUL Limitation/Obligation
Soil	Method 1 or 2	Soil meets S-2 and S-3 standards, but does not meet S-1.	No routine exposure to children.	AUL prohibits residential, school, playground, or day care use of the site.
Soil	Method 1 or 2	Soil at depth does not meet S-2, but does meet S-3 standard.	Excavation could expose construction workers to contamination.	AUL prohibits excavation or prohibits excavation without the development and implementation of an appropriate Health and Safety and Soil Management Plans.
Soil	Method 1 or 2	Soil does not meet the S-1 standard, but such soil is below a solid pavement barrier.	Exposure to soil is prevented by this barrier	AUL requires that the barrier be inspected and maintained.
Soil	Method 3	Soil does not show No Significant Risk for the S-2 soil category.	No direct contact with soils by workers or recreational use.	AUL requires placement and maintenance of a barrier to direct contact, such as 3 feet of clean fill and a demarcation layer and includes requirement to implement appropriate Health and Safety and Soil Management Plans.
Groundwater or Soil	Method 3	VOCs in GW and/or soil are migrating into indoor air of an on-site building.	Installation of a vapor barrier, subslab depressurization system, or subslab venting to prevent vapor intrusion from subsurface to indoor air.	AUL requires maintenance of the vapor barrier, subslab depressurization system, or subslab venting system.
Indoor Air	Method 3	VOCs in indoor air attributable to the disposal site are at a level of No Significant Risk for Commercial/Industrial Use, but represent significant risk for residential use.	OHM in indoor air attributable to the disposal site are at/are maintained at a level of No Significant Risk for current use.	AUL limits future building use to commercial/industrial or requires the installation of Exposure Pathway Mitigation Measure(s) and post-installation sampling before building may be used as a residence.
Subslab Soil Gas	Method 3	VOCs are high in the subslab soil gas, but there are no current impacts to indoor air.	Building conditions, including building slab, are maintained to prevent migration of VOCs into indoor air.	AUL provides notice of the presence of high VOC levels in the subslab soil gas, specifies the maintenance of the building slab, and in the event of future renovation or construction, the repair/restoration of the barrier/slab to prevent the migration of VOCs into indoor air.
Groundwater	Method 1, 2 or 3	NAPL with Micro-Scale Mobility.	Exposure to NAPL could occur with future construction, NAPL management may be necessary.	AUL provides notice of NAPL's presence and location, requires protection of construction workers, and alerts property owners to the need for contingencies to manage NAPL in the event of excavation into the area where it is present.
Sediment	Method 3	Sediments capped as part of remedy.	Cap prevents exposure to contamination.	AUL requires inspection and maintenance of the cap.



## **SECTION 3: AUL TYPES AND ELEMENTS**

The information in this section distinguishes between the types of AULs, and describes in detail the components of the Notice of Activity and Use Limitation, the most commonly used type of AUL.

### **3.1 Authority for Establishing AULs**

MassDEP is authorized by M.G.L. c.21E, § 6 to acquire interests in, or to restrict use of, real property as a tool to ensure that OHM are cleaned up adequately. Specifically, Section 6 provides, in pertinent part, that if necessary to carry out the purposes of Chapter 21E to protect public health, safety, welfare or the environment, MassDEP may:

- acquire real property or any interest therein, by purchase, gift or lease, or by eminent domain under the provisions of M.G.L. c. 79;
- restrict the use of property that is or was a site or vessel; and
- record, or may cause, allow, or require the owner of property to record, notice of the restrictions of the use of such property or of the modification or release of such restrictions..

Section 6 also provides that "no restriction held by MassDEP shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body, provided such restrictions or assignments are approved by the commissioner of MassDEP."

The AUL requirements set forth in the MCP are intended to ensure that AULs appropriately describe permitted uses and limitations on uses of the property which are protective of health, safety, public welfare, and the environment; and are prepared and recorded or registered in the same manner and with the same professional standards as other similar real estate instruments.

### **3.2 Types of AULs**

The authorization in M.G.L. c. 21E, §6 led MassDEP to develop the following types of AULs or forms of land use control in the MCP:

1. Grant of Environmental Restriction or "Grant" [see 310 CMR 40.1071];
2. Notice of Activity and Use Limitation or "Notice" [see 310 CMR 40.1074];and
3. Environmental Restriction (imposed by MassDEP) [see 310 CMR 40.1073].

The Grant and Notice are designed for use by and at the discretion of property owners. The Environmental Restriction may be imposed by MassDEP where MassDEP conducts response actions and the property owner fails to implement an AUL at the property where control of land use is considered necessary. Since the intent of this Guidance is to provide the requirements for AULs implemented and maintained by property owners, no additional discussion of the Environmental Restriction is provided.

### **3.3 Differences between the Grant and Notice**

The Grant of Environmental Restriction and Notice of Activity and Use Limitation have important similarities, but also distinct differences. Both the Grant and Notice document that a release of

OHM has occurred at a property, that response actions have been conducted at the site, and that the protectiveness of the cleanup relies upon limiting certain activities and uses at the property. The legal effects of a Grant and Notice, however, differ significantly.

### 3.3.1 Grants [310 CMR 40.1071]

A Grant of Environmental Restriction conveys property interests to MassDEP. Such interests take the form of restrictions, easements and covenants. Present and future property owners, present interest holders who have subordinated their interests to the Grant, and future interest holders are legally required to abide by the terms of the Grant and its restrictions, easements and covenants. MassDEP, as the grantee or recipient of such interests, has the right to enforce the terms of the Grant if these terms are violated.

MassDEP may enforce the Grant under the MCP or seek legal and/or equitable remedies through the courts. In general, MassDEP may pursue enforcement actions for Grant violations against the party who caused the violation (or allowed the violation to occur) [see 310 CMR 40.0019].

Use of a Grant requires review and approval by MassDEP, and payment of associated permit fees. Subordination agreements must be obtained from current interest holders. By these subordination agreements, the interest holders acknowledge the primacy of the Grant over their rights and agree to comply with the Grant's terms when exercising their rights in the affected property. Without such agreement(s), parties whose property interests were created prior to the Grant would not be legally obligated to comply with the terms of the Grant.

Procedures for implementing Grants are provided in *Appendix J*.

### 3.3.2 Notices of Activity and Use Limitation [310 CMR 40.1074]

A Notice of Activity and Use Limitation does not convey a property interest to MassDEP, nor does it require advanced review or approval by MassDEP, or payment of permit fees. Rather, it operates as a Notice of record at the appropriate Registry of Deeds and/or Land Registration Office, identifying activities and uses that are consistent and inconsistent with maintaining a condition of No Significant Risk. A Notice is "implemented" when it is recorded and/or registered by the property owner(s) in the appropriate Registry of Deeds or Land Registration Office.

A Notice does not require subordination agreements from interest holders. However, written notification to current record interest holders is required within 30 days prior to recording and/or registering the Notice [see 310 CMR 40.1074(1)(e)]. Current record interest holders are those individuals or entities with an interest in the subject property on record at the Registry of Deeds or registered in the Land Court (e.g., owners, mortgage holders, lessees or tenants, and easement or license holders). See *Section 5.3* for a more detailed discussion of the requirement to notify current interest holders.

MassDEP can enforce the terms of a Notice through enforcement of M.G.L. c. 21E and the MCP. The MCP establishes adverse consequences for performing activities or uses that are inconsistent with maintaining a condition of No Significant Risk, and thus violating an Permanent or Temporary Solution [see 310 CMR 40.0019 and 40.0020]. Thus, a Notice, together with the relevant MCP provisions, is intended to be the functional equivalent of a land use restriction that could otherwise be established by a Grant. In general, MassDEP can pursue enforcement actions against a party for violating a Permanent or Temporary Solution when the terms of the AUL have not been met.



### **3.4 Rationale for the AUL Requirements**

In establishing the requirements of an AUL, MassDEP's objective was to create a standardized document whose content and format accurately and clearly describe what can and cannot happen at a site to maintain a condition of No Significant Risk. Since AULs are real estate instruments, it was necessary for MassDEP to take into account applicable real estate law and practice standards. Thus, the legal terms and format of the AUL forms published in the MCP are similar to other real estate instruments, and the requirements for AULs are consistent with conveyancing law.

The MCP reflects the legal requirements and practice standards by requiring that:

- the property owner sign the AUL;
- surveys be prepared by a Massachusetts Registered Land Surveyor and recorded as plans with the Registry of Deeds;
- legal descriptions be provided defining the parcel and the area subject to the AUL; and
- what can and cannot happen at the site and the obligations and conditions for maintaining a condition of No Significant Risk at the site be clearly identified.

### **3.5 Elements of a Notice of Activity and Use Limitation ("Notice") [see 310 CMR 40.1074(2)]**

A Notice identifies the subject property and describes the activities and uses that are consistent with and inconsistent with maintaining a condition of No Significant Risk at a property. Notices must be prepared using Form 1075 provided in the MCP at 310 CMR 40.1099 (see *Appendix H* for a complete list of AUL forms). This section describes the elements contained in a Notice (Form 1075). A similar discussion about Grants (Form 1072B) is provided in *Appendix J*.

The information required to be included in a Notice is found at 310 CMR 40.1074(2) and is described below in the order in which it appears in Form 1075 (see *Appendix C, "Step by Step Through Form 1075"* for additional guidance on completing Form 1075):

- The MassDEP Site Name (if there is one) and MassDEP Release Tracking Number(s) [see 310 CMR 40.1074(2)(d)];
- The date on which the Notice is signed by the property owner and the name and address of the property owner [see 310 CMR 40.1074(2)(b)];
- \* First "Whereas" Clause – provides general information about the property containing the area subject to the AUL, including the name of the property owner, the address of the property, the municipality and county in which the property is located (if the property owner is a corporation, the state of incorporation and the principal place of business should be included). The reference to the owner's source of title: for recorded land, the deed book and page number; for registered land, the Certificate of Title number. If the owner inherited the property, the probate docket number should also be included [see 310 CMR 40.1074(2)(a)1. and 40.1074(2)(b)];
- Second "Whereas" Clause – refers to the legal description of the parcel of land containing the area subject to the AUL (which is attached as Exhibit A). If the land is

recorded, the Registry of Deeds recording reference for the survey plan showing the parcel must be inserted in this clause. If the land is registered, the Land Court Plan reference must be inserted. [see 310 CMR 40.1074(2)(a)2. and 40.1074(2)(a)3.]

- Third “Whereas” Clause (only included if the AUL applies to a portion of the property rather than the entire property) – refers to the legal description of the portion of the property subject to the AUL which must be attached as Exhibit A-1 and references the survey plan or Land Court Plan for the portion. For recorded land, the Plan Book and Plan Number must be inserted. For registered land, an 8½“ x 11” survey plan prepared by a Massachusetts Registered Land Surveyor delineating the portion of the property subject to the AUL must also be attached as Exhibit A-2. Please note that the Land Court sometimes refers to such plans as “sketch plans” [see 310 CMR 40.1074(2)(a)4.];

- Fourth “Whereas” Clause – establishes whether the area subject to the AUL contains the entire disposal site or a portion of the disposal site. This clause also refers to a sketch plan showing the boundaries of the area subject to the AUL in relation to the disposal site boundaries, to the extent that the boundaries of the disposal site have been established. The sketch plan is attached to the AUL as Exhibit B [see 310 CMR 40.1074(2)(a)5.];

- Fifth “Whereas” Clause – establishes that response actions taken at the site are based on restrictions on human access to OHM remaining at the property, and the restriction of certain activities occurring “in, on, through, over or under” the area subject to the AUL. This clause also establishes that a discussion of the basis for the restrictions is to be provided as an attachment to the Notice (Exhibit C) [see 310 CMR 40.1074(2)(e-g) and Section 4.7 of this Guidance]. ;

- The next paragraph (that begins “NOW, THEREFORE...” ) establishes that notice is being given of certain activity and use limitations.

- Numbered sections:

“1. Activities and Uses Consistent with Maintaining No Significant Risk or No Substantial Hazard Conditions” – lists uses and activities that are consistent with a condition of No Significant Risk in the area subject to the AUL [see 310 CMR 40.1074(2)(h)];

“2. Activities and Uses Inconsistent with Maintaining No Significant Risk or No Substantial Hazard Conditions” - lists uses and activities that would be inconsistent with the objectives of the Notice. Restrictions place limits on such uses (e.g., residential use) or activities (e.g., uncontrolled excavation activities) that may result in significant risk of harm, safety, public welfare or the environment, or a substantial hazard [see 310 CMR 40.1074(2)(i)];

“3. Obligations and Conditions” – lists any obligations or conditions that must be followed or undertaken to maintain a condition of No Significant Risk or eliminate a substantial hazard. For a Permanent Solution with Conditions that relies on the operation and maintenance of an Active Exposure Pathway Mitigation Measures, the standard language that reflects the criteria set forth in 310 CMR 40.1025(3) must also be included in this paragraph;

“4. Proposed Changes in Activities and Uses” - specifies that any proposed changes in activities and uses at the area subject to the AUL that may result in higher levels of exposure to OHM require an evaluation by an LSP in accordance with 310 CMR 40.1080 *et seq.* [see 310 CMR 40.1074(2)(i)] and Section 6.2 of this Guidance, *Changes in Site Activities and/or Uses or Other Site Conditions after a Response Action Outcome with an Activity and Use Limitation has been Submitted*].

“5. Violation of a Permanent or Temporary Solution” - specifies that activities and uses upon which the Notice is based may not “change at any time to cause a significant risk” without prior evaluation by an LSP and any necessary response action. This paragraph references the requirement in 310 CMR 40.0020 that the owner or operator of a property notify MassDEP in the event of any such change of activity or use that occurs without prior LSP evaluation and necessary response actions.

“6. Incorporation Into Deeds, Mortgages, Leases and Instruments of Transfer” - requires that the Notice be referenced or incorporated into any subsequent “deeds, easements, mortgages, leases, licenses, occupancy agreements” or other instruments that transfer an interest in or a right to use the area subject to the AUL [see 310 CMR 40.1074(2)(h)].

- The notarized signature of the property owner and the notarized signature and seal of the LSP. Note that the date entered by the owner in this section should be the same date that is entered on the first page of the Notice as the date on which the Notice is made. The signature of the LSP must not predate the signature of the owner. [See 310 CMR 40.1074(2)(j)]
- Exhibits:

Exhibit A: a written legal description of the parcel of land that contains the area subject to the AUL.

Exhibit A-1 (*only needed if the AUL applies to a portion of the property*): a written legal description of that portion to which the AUL applies.

Exhibit A-2 (*only needed when the AUL applies to a portion of registered land*): a plan of the portion prepared by a Massachusetts Registered Land Surveyor.

Exhibit B: a sketch plan showing the boundaries of the area subject to the Notice in relation to the boundaries of the disposal site. (*This plan does not need to be prepared by a Registered Land Surveyor.*)

Exhibit C: a narrative description of the basis for the AUL restrictions.

Exhibit D: documentation of signatory authority, if necessary.

A Registry-copy of the AUL must be submitted to MassDEP using transmittal form BWSC-113. MassDEP must also be provided with a Registry copy of all survey plans referenced in the Notice (plans for the parcel and for the portion of the property).

## SECTION 4: PREPARING AN AUL

This section discusses important legal considerations and identifies the necessary steps in preparing an AUL for recording or registration. *See also Appendix C, “Step By Step through Form 1075” and Appendix I, “Activity and Use Limitation Checklist.”*

It is important that both the property owner who is considering using an AUL and his or her LSP understand that **an AUL is a legal real estate document** that functions as a component of a response action in accordance with MCP requirements. Since an AUL documents limitations on activities and uses occurring at a site, the property owner needs to be clear about what those limitations are, the area(s) of the property subject to such limitations, and ongoing maintenance obligations for adhering to the AUL conditions. In this regard, MassDEP strongly advises the preparer of an AUL to discuss specifically with the property owner the AUL requirements, the consequences of the site use limits under consideration, and the consequences of violating the terms set forth in the AUL. Consideration of these factors up front will reduce the likelihood of needing to amend the AUL, or to terminate the AUL and draft a new one.

### **4.1 The Difference between Recorded and Registered Land**

Documents pertaining to real property in the Commonwealth are filed at the Registry of Deeds. Massachusetts is divided into twenty-one (21) registry districts, each under the direction of a different Registrar of Deeds. Since procedures may vary, it is important to consult with the appropriate Office of the Registry of Deeds to ensure that all filing requirements are met. The “City/Town to Registry Guide” on the Registry of Deeds webpage at <http://www.sec.state.ma.us/rod/rodidx.htm> can be used to determine the Registry District that includes the subject property.

Real property in the Commonwealth of Massachusetts is either Registered Land or Recorded Land. In drafting an AUL, it is important to know which type of land is involved, because plan requirements and property descriptions differ between these two separate land indexing systems.

#### **4.1.1 Recorded Land**

Most real property in Massachusetts is Recorded Land. A transfer of ownership in Recorded Land is typically completed by recording a new deed at the Registry of Deeds. Dealings with Recorded Land are based on the concept of caveat emptor (“let the buyer beware”). There is no judicial determination of title and boundaries with Recorded Land, so the recording of a deed does not guarantee that the property is free from all liens, encumbrances, and other legal problems that would cloud the title. Thus, performing a title search is generally necessary to determine the status of a property in Recorded Land.

Documents pertaining to Recorded Land are located at the Recorded Land section of the Registry of Deeds and are indexed by book and page numbers. Upon filing, a document is assigned an “instrument” number, but may not be assigned a book and page number until a later date. Assignment of a book and page number will vary depending upon the specific Registry. As such, a Registry copy of the AUL with the instrument number and the date of recording is sufficient for submitting an implemented AUL to MassDEP.

The Registry of Deeds will return the original of the recorded AUL to the property owner with the assigned book and page number. The property owner should retain the original AUL for his or her records.

#### 4.1.2 Registered Land

Land for which the title and boundaries have been created by a decree of the Massachusetts Land Court pursuant to MGL c. 185 (“The Land Court and Registration to Title to Land”) is termed Registered Land. Typically, Registered Land has at some point been the subject of an ownership or boundary dispute. Once the Land Court renders a decision as to ownership and boundaries of a parcel of land, those issues cannot be challenged (unless it can be proven that fraud was involved in filing the registration petition). An owner is issued a Certificate of Title in which the Land Court declares that he or she is the owner of the property. The Certificate of Title, along with the registration plan issued by the Land Court, identify the boundaries of the subject parcel.

Although the Land Court has exclusive jurisdiction over Registered Land and functions separately from the Registry of Deeds, all registry districts operate a separate “Registered Land section” as an adjunct of the Land Court. Documents pertaining to Registered Land are indexed by Document Numbers assigned upon filing, and should reference the Certificate of Title associated with the property. The Certificate identifies most outstanding encumbrances, such as mortgages, easements, and liens. When a document is registered, it should be annotated on the back of the Certificate of Title for the associated property. When the property is transferred to a new owner, a new Certificate of Title is issued to the new owner upon the filing of the deed.

The Registered Land section of the Registry of Deeds retains all original documents; the property owner will only receive a copy of the original.

The “Commonwealth of Massachusetts Land Court Guidelines on Registered Land” provides detailed procedures for Registered Land. This document can be found on the Land Court webpage at: <http://www.mass.gov/courts/courtsandjudges/courts/landcourt/index.html>

#### 4.1.3 Land that is both Recorded and Registered

If the document to be filed pertains to both Recorded and Registered Land, the requirements of both the Registry of Deeds and Land Court need to be met. Generally, both sets of requirements can be satisfied by following either of the following procedures:

1. obtain two sets of original documents and file one as Recorded Land and one as Registered Land; or
2. obtain one set of original documents, and file the originals as Registered Land, and then record the registered documents as Recorded Land. Depending on the procedures of the specific registry district, the document recorded will either be the original or a certified copy of the registered document. In either case, the original document is returned to the Registered Land section.

## 4.2 Description of the Area Covered by the AUL

An AUL must describe the parcel of land that contains the area subject to the AUL. A written legal description of this parcel of land must be attached to the AUL as Exhibit A. This



requirement can best be satisfied by obtaining the description from an accurate and current survey plan that has already been recorded with the Registry of Deeds.

An AUL must also include a legal description of the specific area within the parcel that is subject to the AUL. The parcel of land and the specific area subject to the AUL may be one and the same if the property owner chooses to limit site use across the entire property. When the remaining contamination is limited to only a portion of the property and the property owner elects to apply the AUL just to that portion, then it is necessary to provide a written metes and bounds description of that portion as Exhibit A-1 of the AUL. If the entire property is subject to the AUL, then the description provided by Exhibit A satisfies both requirements.

Consequently, in crafting an AUL, the property owner needs to decide whether to restrict the entire property or only a portion of it. If the property is small in size and has a singular use, for example a service station, it may be less costly and less complicated for AUL compliance purposes to restrict the entire property. When only a portion is to be restricted, an additional survey is necessary to delineate the boundaries of the portion being restricted. Depending upon the size of the lot and its versatility, the potential for decreased property functionality or value when restricting the entire property may exceed the cost of a survey. It may make more sense to carve out restricted and unrestricted areas if the property owner wishes to preserve flexibility in use of the property, especially if the restricted area does not comprise a major portion of the property.

If restricting the entire property, the entire property will be subject to restrictions in the AUL. For example, an AUL on the entire property cannot restrict excavation “in paved areas of the site” unless the paved area of the site has been surveyed. Without surveying the boundaries of the paved area, excavation would need to be restricted throughout the AUL area, which is the entire property.

#### 4.2.1 Recorded Land

A “running” description is the type of metes and bounds description used to describe both the perimeter of the parcel of land and the area subject to the AUL if the land is recorded. Accordingly, Exhibit A and Exhibit A-1 should contain running descriptions. A running description uses compass directions and distances. An example of such a description is: “Beginning at a point on the northerly side of Main Street; thence turning and running N 20° 10' 30" W, one hundred (100) feet to ...”. Such a description may be obtained from the property owner’s deed as long as it is based on a survey plan that was recorded at the Registry of Deeds before the AUL was recorded.

#### 4.2.2 Registered Land

If the land is registered land, the legal description for the parcel (attached as Exhibit A) will either be a “bounding description” of the parcel’s perimeter (e.g., “NORTHERLY by Old Boston Road, one hundred (100) feet...”), or a reference to a lot number on a Land Court Plan and a reference to the certificate with which the plan is filed (see Land Court Guidelines on Registered Land, February 27, 2009). Such a description may be obtained from the Owner’s Certificate of Title, and thus this requirement may be satisfied by attaching a copy of the Owner’s Certificate of Title as Exhibit A.

If the area subject to the AUL is a portion of a property which is registered land, then the legal description describing the AUL portion of the property (Exhibit A-1) needs to be a running description.

### **4.3 Plans Describing the Land Covered by an AUL**

Survey Plan. It is critical that an AUL accurately describe the land to which it applies and that any terms used to identify the AUL on the plan are consistent with the terms used in the AUL. The MCP requires that a survey plan of the parcel containing the area subject to the AUL and the specific area subject to the AUL be prepared by a Massachusetts Registered Land Surveyor. Both the parcel of land containing the AUL area and the AUL area itself must be clearly and accurately defined for purposes of delineating property lines, avoiding conflicts with abutters about the boundaries of the property and the AUL area, and complying with the terms of the AUL.

Sketch Plan. A sketch plan must also be prepared to show the location of the area subject to the AUL relative to the boundaries of the disposal site. Although the sketch plan should be accurate, it is not intended to establish legally enforceable boundaries. Thus, the sketch plan need not be prepared by a Massachusetts Registered Land Surveyor.

The sketch plan should provide pertinent information regarding the area that is subject to the AUL, and which is not otherwise included in the survey plan. Pavement, buildings, or other barriers within the boundaries of the AUL area that must be maintained to ensure a level of No Significant Risk must be depicted on a survey plan if the restrictions for the area within the barrier are different than the restrictions within the entire AUL area. However, a sketch plan depicting the boundaries of a barrier is appropriate when the restrictions are the same throughout the entire AUL area.

#### **4.3.1 Survey Plan of Parcel Containing Area Subject to the AUL [310 CMR 40.1074(2)(a)3.]**

Recorded Land. The AUL must reference a survey plan prepared by a Massachusetts Registered Land Surveyor showing the boundaries of the parcel of land containing the area subject to the AUL. Check with the appropriate Registry of Deeds to determine whether a survey plan has been recorded. A survey plan that has already been recorded at the Registry of Deeds (i.e., it is “of record” at the Registry) may be referenced to describe the parcel of land within which the area subject to the AUL is located, if the plan is still current. However, if the plan no longer accurately reflects the boundaries of the property (e.g., the property has been subdivided and/or portions of the property have been sold since the survey plan was prepared), then a new survey plan is required to show the property boundary as it exists on the date of the recording of the AUL.

The recording information of the survey plan (i.e., the Plan Book and Plan Number) must be referenced in the second “Whereas” clause of the AUL. Note that if a new plan is required, then a new legal description should also be prepared rather than relying on a copy of the property owner’s deed for Exhibit A.

If a new survey plan is needed, then a perimeter survey of the parcel within which the area subject to the AUL is located must be prepared by a Massachusetts Registered Land Surveyor in accordance with the Registry of Deeds plan recording requirements. Plan recording requirements are established pursuant to M.G.L. Chapter 36, Section 13A, “Plans, Rules for

Filing in Registries” (see also *Appendix F, “Requirements for Survey Plans,”* for plan recording requirements). To satisfy the AUL survey plan requirement for the parcel of land, this survey plan must be recorded with the Registry of Deeds in the plan department independent of the AUL (i.e., not attached as an exhibit). The new survey plan must be recorded before recording the AUL, so that the new plan can be referenced in the AUL.

Whether referring to an existing survey plan or to a newly recorded plan, the plan recording information must be inserted into the second “Whereas” clause of the AUL before recording the AUL.

Registered Land. If the land is registered, then a survey plan, or Land Court Plan, already exists. The Land Court Plan is referenced in the owner’s Certificate of Title and may be found at the Registered Land section of the Registry of Deeds and/or the engineering department of the Land Court.

#### 4.3.2 Survey Plan of Area Subject to the AUL [310 CMR 40.1074(2)(a)4.]

If the AUL applies to only a portion of the property, then a survey plan delineating that portion must be prepared by a Massachusetts Registered Land Surveyor.

Recorded Land. If the land is recorded land, then this survey must be recorded with the plan department of the Registry of Deeds independently of the AUL and before the AUL is recorded. The recording information for this plan (i.e., the book and page number) must be referenced in the third “Whereas” clause of the AUL before the AUL is recorded.

If a new perimeter survey of a parcel is required (See Section 4.3.1, above) and a survey of the portion of the property subject to the AUL is required, both surveys may be consolidated on a single plan, as a cost-saving measure, provided that both areas are legible on an 11” x 17” copy of the plan submitted to MassDEP.

Registered Land. If the parcel is registered land, then an 8 1/2” x 11” plan must be attached to the AUL as Exhibit A-2. It will not be accepted for filing by the Registry of Deeds independently of the AUL. Preparation of a survey plan by a Registered Land Surveyor is a requirement of the MCP, not the Land Court and thus the Land Court sometimes refers to this type of plan as a “sketch plan” (not to be confused with the sketch plan required by 310 CMR 40.1074(2)(a)5. and described in Section 4.3.3, below).

If a portion of the property subject to the AUL contains both recorded land and registered land, a survey plan would need to be prepared showing the recorded portion and recorded as a plan, and showing the registered portion and attached as an exhibit to the AUL, respectively, in accordance with the above requirements.

#### 4.3.3 Sketch Plan of Area Subject to AUL in Relation to Boundaries of Disposal Site (Exhibit B)

An AUL also requires an 8 1/2” x 11” sketch plan (not to be confused with a Land Court sketch plan) showing the boundaries of the area subject to the AUL in relation to the boundaries of the disposal site. This sketch plan is attached to the AUL as Exhibit B. Although the MCP does not require this sketch plan to be prepared by a Massachusetts Registered Land Surveyor, it must contain accurate distances and a symbol of direction (i.e., North arrow), and must be to scale.



The sketch plan may take the form of an 8 ½" by 11" copy of the required survey plan of the parcel subject to the AUL (that has been or will be recorded), with the boundaries of the disposal site and other pertinent information added. The sketch plan must be clearly readable, so reduction of a larger survey plan to 8 ½" x 11" must be done with consideration of the legibility of such a plan. Alternatively, Exhibit B can be a separate sketch plan showing the boundaries of the parcel subject to the AUL and the disposal site.

Because the Registry of Deeds can only scan documents in black and white, sketch plans should not include color-coding as a key to describing details of the property.

#### 4.3.4 Summary of Legal Descriptions and Plan Requirements

Table 4-1 summarizes the requirements for describing the land to which an AUL applies.

#### 4.3.5 AULs and Multiple Parcels

When there are multiple contiguous parcels that form the area to which an AUL is being applied, one AUL may be implemented that references the multiple parcels, or portions of such parcels, if all parcels are held in common ownership and all parcels are located in the same registry district.

The legal description for each parcel must be included in Exhibit A of the AUL. Multiple deed and plan references should also be provided in Exhibit A (and cross-referenced on Form 1075). If the area to which the AUL applies includes both recorded and registered parcels of land, the original AUL must first be registered in the Registered Land section of the Registry of Deeds, and then either the original or a certified copy of the registered AUL is recorded in the Recording Section of the Registry of Deeds. The original AUL is returned to the Registered Land section. See Section 4.1.3 of this document, and the "Massachusetts Land Court Guidelines on Registered Land" for additional details on procedures pertaining to AULs that involve both Recorded and Registered Land.

#### 4.3.6 Describing Area Subject to an AUL that Relies on One or More Barriers

When an AUL relies on the use of one or more barriers to maintain a condition of No Significant Risk, the AUL must delineate that location of the barrier(s) so that a property owner (particularly a future property owner) knows the exact location of the barriers that must be maintained. Barrier delineation should be done on the sketch plan required by 310 CMR 40.1074(2)(a)5. to show the area of the AUL in relation to the disposal site boundaries, and attached as Exhibit B of the AUL. At a minimum, the sketch plan must meet the requirements of 310 CMR 40.1074(2)(a)5. and Section 4.3.3 of this Guidance, and include accurate information about all of the following:

- all barriers;
- buildings, structures, other encroachments;
- pavement and walkways;
- location of any engineered barriers and caps;
- landscaping;
- all other relevant information specific to the property.

Accurate delineation is particularly important when there are multiple barriers and restrictions are not the same for all areas. For example, an AUL requiring paved areas “to be maintained in good condition” and restricting landscaped areas to “no excavation below the geotextile fabric” would need a sketch plan that very clearly delineates the separate restricted areas, since identical excavation restrictions do not apply to the entire AUL area.

As previously discussed in Section 1.4, it is not appropriate to reference a barrier not yet in place if the presence and maintenance of that barrier is necessary to achieve and maintain a condition of No Significant Risk as part of a Permanent Solution.

#### **4.4 Description of Consistent Activities and Uses**

The “Now, therefore” paragraph of Form 1075 is where activities and uses that are “Consistent” with the AUL are listed. Consistent activities and uses should be carefully identified and described in order to avoid inadvertent omission of an activity or use and drafting an AUL too narrowly. Conversely, broad descriptions of uses and activities should also be avoided, as they may create ambiguity. Either situation could result in the need to amend the AUL in the future. Consistent activities and uses must be in agreement with the risk characterization, i.e., these activities and uses can occur while still maintaining a condition of No Significant Risk.

Following the list of “Activities and Uses Consistent with Maintaining No Significant Risk or No Substantial Hazard” in Form 1075 is the following clause: “Such other activities or uses which, in the Opinion of an LSP, shall present no greater risk of harm to health, safety, public welfare or the environment than the activities and uses set forth in this Paragraph.” This language is in the AUL form to indicate that new activities outside of those listed as “consistent” may be conducted (as long as they are not expressly inconsistent with the AUL), provided that an LSP evaluates the activity or use before the new activity or use occurs in accordance with the procedures specified in 310 CMR 40.1080 and described in Section 6 of this document.

A consistent use often overlooked is the emergency excavation and repair of underground utilities. If the property has underground utilities, emergency excavation and repair of those utility lines is a current use in accordance with 310 CMR 40.0931(2), and therefore is an activity that is “consistent” with the AUL.

#### **4.5 Description of Inconsistent Activities and Uses**

The “Now, therefore” paragraph of Form 1075 also describes the activities and uses that are inconsistent with maintaining a level of No Significant Risk. Inconsistent activities and uses should be carefully identified and described. Vague and broad descriptions can result in an overly restrictive AUL that unnecessarily limits the uses of the property. For example, if excavation is prohibited below a depth of three feet in order to ensure a condition of No Significant Risk, then the language in the AUL should clearly state this. A general statement prohibiting any excavation would unnecessarily preclude digging at shallower depths that do not pose a significant risk.

Over-restricting activities may create additional and unnecessary work. If there is interest in implementing an activity or use that is prohibited by an AUL, then it is necessary to obtain an LSP Opinion stating that such activity is permissible (or that it can be implemented after additional response actions are performed). An amended AUL may be needed if the new

activity or use will be a permanent feature of the site. (See Section 6 on procedures to address changes in use once an AUL has been implemented).

#### **4.6 Description of Obligations and Conditions**

Also found within the “Now, Therefore” paragraph of Form 1075 is a section describing obligations and conditions. This section is intended to provide the property owner, interest holders (and anyone else who looks at the document) with a clear list of measures to be undertaken and/or continued at the property in order to maintain a condition of No Significant Risk. These obligations and conditions do not, however, constitute affirmative covenants that are enforceable in and of themselves, because the Notice does not convey an interest in land. Rather, the list of obligations and conditions serves to put all parties on notice that such obligations and conditions are necessary to meet the objectives of the Notice. The failure to satisfy the listed obligations and conditions would be inconsistent with maintaining a condition of No Significant Risk and therefore could subject the landowner or other party to enforcement under the appropriate provisions of the MCP.

Similar to the language describing activities and uses that are consistent or inconsistent with the AUL, detail is important when describing obligations and conditions necessary to maintain a condition of No Significant Risk. The activity that must be undertaken or maintained should be described precisely so that anyone reading the AUL has a clear understanding of the responsibilities for ensuring that No Significant Risk is maintained. For example, if a cap is not to be disturbed, and is to be maintained in good repair, then such an obligation should be clearly stated. This section may also be used to specify a frequency of inspections, and measures to be taken in response to inspection findings.

In drafting an AUL, it is permissible and appropriate to require that any future excavation occur in accordance with a health and safety and/or soil management plan. The obligation to develop and adhere to such plans would be specified in the AUL in the list of “Obligations and Conditions”. Please note that a health and safety plan and/or soil management plan cannot be used in lieu of an AUL. *For more discussion on referencing health and safety procedures in an AUL, see Section 2.7.3.*

An AUL is required in all cases where a Permanent Solution is being implemented which relies upon an Active Exposure Pathway Mitigation Measure pursuant to 310 CMR 40.1025. In such cases, the Obligations and Conditions portion of Form 1075 must incorporate the four standard conditions as they appear in the MCP. Additional obligations or conditions related to the AEPMM may be added, provided the additional conditions are consistent with the four required obligations and conditions.

**Table 4-1: HOW TO DESCRIBE THE LAND COVERED BY AN AUL**

LAND AREA	REGISTERED LAND	RECORDED LAND
<p>A. Parcel containing AUL area (See <i>Guidance Section 4.2</i>)</p> <ul style="list-style-type: none"> <li>Survey Plan (See <i>Guidance Appendix F</i> for Plan Requirements)</li> </ul>	<ul style="list-style-type: none"> <li>Reference Land Court Plan Number in AUL's 2<sup>nd</sup> "Whereas" clause</li> </ul>	<ul style="list-style-type: none"> <li>If a survey plan has already been recorded, reference the Registry of Deeds' Plan Book / Plan Number in AUL's 2<sup>nd</sup> "Whereas" clause;</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>If a survey plan has not been recorded, have one prepared by an MA Registered Land Surveyor and record it before the AUL is recorded. Reference Registry of Deeds' Plan Book / Plan Number in AUL's 2<sup>nd</sup> "Whereas" clause</li> </ul>
<ul style="list-style-type: none"> <li>Written Description</li> </ul>	<ul style="list-style-type: none"> <li>Use legal description from property owner's Certificate of Title issued by Land Court [attach to AUL as Exhibit A]</li> </ul>	<ul style="list-style-type: none"> <li>Copy metes and bounds from recorded survey plan [attach to AUL as Exhibit A];</li> </ul> <p>OR</p> <ul style="list-style-type: none"> <li>Copy metes and bounds from deed referencing a survey plan recorded with Registry of Deeds [attach to AUL as Exhibit A]</li> </ul>
<p>B. Area to which AUL applies (only needed if this area is a portion of the property) (See <i>Guidance Section 4.3.1</i>)</p> <ul style="list-style-type: none"> <li>Survey Plan (See <i>Guidance Appendix F</i> for Plan Requirements)</li> </ul>	<ul style="list-style-type: none"> <li>Have a survey plan of AUL area prepared by a MA Registered Land Surveyor [attach to AUL as Exhibit A-2]</li> </ul>	<ul style="list-style-type: none"> <li>If a survey plan of the AUL area has already been recorded, reference the Registry of Deeds' Plan Book / Plan Number in the AUL's 3<sup>rd</sup> "Whereas" clause</li> <li>If a survey plan of the AUL area has not been prepared, have one prepared by an MA Registered Land Surveyor. Record plan before the AUL is recorded and reference the Registry of Deeds' Plan Book / Plan Number in the AUL's 3<sup>rd</sup> "Whereas" clause (Plan does not get attached to AUL as an exhibit). If a survey plan of the parcel containing the AUL area is also being prepared, both the parcel and the AUL area can be shown on the same plan.</li> </ul>
<ul style="list-style-type: none"> <li>Written Description</li> </ul>	<ul style="list-style-type: none"> <li>Copy legal description from survey plan [attach to AUL as Exhibit A-1]</li> </ul>	<ul style="list-style-type: none"> <li>Copy metes and bounds from recorded survey plan [attach to AUL as Exhibit A-1]</li> </ul>
<p>C. Relationships between AUL area and disposal site (contaminated area) (See <i>Guidance Section 4.3.3</i>)</p> <ul style="list-style-type: none"> <li>Sketch Plan</li> </ul>	<ul style="list-style-type: none"> <li>Prepare a sketch plan showing both the boundaries of the AUL area (from survey plan) and the boundaries of the oil or hazardous material release within the property (from site assessment) [attach to AUL as Exhibit B]</li> </ul>	<ul style="list-style-type: none"> <li>Prepare a sketch plan showing both the boundaries of the AUL area (from survey plan) and the boundaries of the oil or hazardous material release within the property (from site assessment) [attach to AUL as Exhibit B]</li> </ul>
<ul style="list-style-type: none"> <li>Written Description</li> </ul>	<ul style="list-style-type: none"> <li>None Needed</li> </ul>	<ul style="list-style-type: none"> <li>None Needed</li> </ul>

#### **4.7 Narrative Describing the Basis for AUL (Exhibit C) [see 310 CMR 40.1074(2)(e-g)]**

A narrative describing the basis for the AUL must be prepared by an LSP and attached to the AUL form as Exhibit C. This narrative must include the information noted below, keeping in mind that sufficient detail should be provided so that a reader who is unfamiliar with the MCP requirements and terminology can understand what has occurred at the property requiring the implementation of an AUL and the terms of the AUL.

At a minimum, the following elements must be included in the narrative description:

- a statement specifying why the AUL is appropriate to maintain a Permanent Solution and condition of No Significant Risk or maintain a Temporary Solution and a condition of No Substantial Hazard;
- a concise summary of the OHM release events or site history (i.e., date of release(s), to the extent known, release volume(s), and response actions taken to address the release(s) that resulted in the contaminated media subject to the AUL; and
- a description of the contaminated media (i.e., media type(s), contaminant types(s), approximate vertical and horizontal extent) subject to the AUL.

#### **4.8 Documentation of Signatory Authority (Exhibit D)**

If the owner of the property to be subject to the AUL is an entity, rather than an individual, then documentation of the signatory authority of the individual signing the AUL must be attached as Exhibit D to the AUL. Entities include, but are not limited to, corporations, limited liability corporations, limited liability companies, limited partnerships, trusts, municipalities, states, and the federal government. Signatory authority documentation must also be attached as an exhibit to the AUL if the individual signing the AUL is signing as a trustee, executor, or attorney in fact.

As a general rule, the signatory documentation attached to an AUL should be consistent with current conveyancing standards and practices, and equivalent to what would be required for a sale of the property. If there are questions as to the appropriate documentation for signatory authority, MassDEP recommends that a real estate attorney be consulted about the documents required.

Please note that some Registries of Deeds require that documentation of signatory authority be recorded separately from the AUL. In such cases, the book and page number or document number generated by this separate recording should also be transmitted to MassDEP.

See *Appendix D* for specific information relevant to determining which person(s) has signatory authority for an AUL and what documents are required as an exhibit to the AUL submittal.

#### **4.9 Deleting or Changing Language of AUL Forms**

The AUL forms are codified in the MCP and must not be edited. Changing or deleting language of an AUL form, except to eliminate inapplicable bracketed language or to add a clarifying notation as described in Section 4.10 below may invalidate the AUL and the Permanent or Temporary Solution that relies upon it.



#### **4.10 Adding Language to AUL Forms**

Language may be added to AUL forms for the purpose of providing greater detail and clarity. For instance, if the property is held in trust, it would be helpful to include the book and page of the Declaration of Trust. Any language that is added to the standard form should be concise and limited to only what is necessary to provide critical information – one to two sentences if possible. Language may not be added which contradicts or qualifies the standard form language.

#### **4.11 Requirements for a Registry Copy of the AUL**

A Registry copy of an AUL, as required under 310 CMR 40.1074, is a copy of an AUL bearing the book and page/instrument number and/or document number. . Any other type of copy is insufficient (i.e., the Permanent or Temporary Solution submittal will not be considered complete). To comply with the requirement for electronic MCP submittals, it is acceptable to submit an electronic scanned copy of the Registry copy of the AUL to satisfy this requirement.

#### **4.12 Transmittal Form**

Transmittal form BWSC-113 – Activity and Use Limitation (AUL) Transmittal Form is necessary when submitting a Registry copy of the AUL to MassDEP.

## SECTION 5: AUL RECORDING AND PROCESSING REQUIREMENTS

This section addresses the procedural requirements for implementing an AUL after it has been properly prepared and signed by the property owner and the LSP. Once the Notice form has been filled out (with all the relevant exhibits) and signed, the next step is recording or registering the Notice with the appropriate Registry of Deeds.

### **5.1 Recording and/or Registration Requirements for All AULs**

An AUL must be recorded at the appropriate Registry of Deeds and/or registered with the Land Court in order for the AUL to be deemed implemented and in effect [see 310 CMR 40.1070(3)]. Recording and registration requirements for the acceptance of real estate documents by the Registry of Deeds are very specific and need to be complied with strictly for the AUL to be legally effective. In addition, requirements may vary from county to county and change periodically. Consequently, this guidance should not be considered a substitute for case specific legal advice; MassDEP recommends that an experienced real estate attorney be consulted to ensure acceptance of the AUL by the applicable Registry of Deeds and/or Land Court.

#### **5.1.1 Recording Requirements**

Requirements for recording real estate documents include, but are not limited to, name and address identification, document identification, document dimensions, font size, page margins, document highlighting, written signature execution and signature identification, and notarization requirements. The “Massachusetts Deed Indexing Standards” provides statewide procedures intended to be effective at all Registry of Deeds. These standards address issues such as document formatting requirements (e.g., paper type, font size, page margins) for all documents recorded at any Registry and are provided in Appendix G. Similarly, some rules for plan recording (e.g., formatting, signatures, and graphics) are consistent within the different Registries (see Appendix F).

Remember, however, that the recording requirements referenced in this guidance are not inclusive - *it is important to check with the specific Registry where the AUL and supporting documents will be recorded to determine if there are any additional Registry-specific requirements that apply.* In addition to document preparation rules, individual Registries implement their own procedures for payment, the number of documents that may be recorded in a single day, and the time of day documents will be accepted for recording.

Much of the information pertaining to general and Registry-specific requirements is available online – links to the individual Registries can be found at <http://www.sec.state.ma.us/rod/rodidx.htm>.

#### **5.1.2 Registration Requirements**

The registration of documents with the Land Court has its own set of requirements, pursuant to M.G.L., c. 185. As described in Section 4.1 of this Guidance, a decree by the Land Court creates registered land – once a judgment has been obtained registering a parcel of land, the Land Court enters a Certificate of Title and the land is forever registered until the property is withdrawn. The acceptance of subsequent encumbrances and restrictions on property after title

has been established through the original registration process are also subject to the Land Court's strict procedures [see M.G.L. c. 185, §§57-63]. Once an AUL is accepted for registration, a notation will be added to the Memorandum of Encumbrances accompanying the Certificate of Title for the registered parcel of land.

In order for an AUL to be accepted for registration, the property owner must comply with the Land Court Guidelines on Registered Land (last updated February 27, 2009). In particular, Section 19 of the Guidelines addresses "easements, restrictions, covenants and other rights granted or reserved in a deed," and contains procedures that apply to registering an AUL.

The Land Court also provides specific requirements for the acceptance of surveys and plans in the Land Court Instruction Manual. As stated in the Manual's introduction, "[c]ompliance with these instructions is mandatory, and no survey or plan will be accepted for filing unless these requirements have been fulfilled to the satisfaction of the Land Court's Survey Division." Accordingly, a property owner registering an AUL must ensure that both the survey plan (if required) and the sketch plan comply with the technical requirements of the Land Court Instruction Manual and the MCP.

The Land Court Guidelines on Registered Land and the Land Court Instruction Manual can be found on the Land Court's webpage at <http://www.mass.gov/courts/court-info/trial-court/lc/lc-rules-guide-stand-gen.html>

## **5.2 Documents to be Submitted to MassDEP**

Within thirty days of an AUL being recorded with the appropriate Registry of Deeds and/or registered with the Land Court, the property owner must submit to MassDEP the following documents, in accordance with 310 CMR 40.1074(4):

- A Registry copy of the AUL. The Registry copy is necessary to verify that the document submitted to MassDEP is an exact copy of the AUL as recorded/registered, which is stamped by the Registrar of the Registry of Deeds. If the land is registered land, the Registry copy will include a document number. If the land is recorded land, the Registry copy will include an instrument number and/or book and page number. It is sufficient to submit a scanned copy of the Registry document as an electronic submittal.
- A Registry copy of all survey plans referenced in the AUL. Specifically, the survey plan of the parcel and the survey plan of the portion of the parcel, if applicable (see the second and third whereas clauses in the AUL forms). The Registry copy will bear the recording information for the plan. If the parcel is registered land, a copy of the Land Court Plan should be provided. It is sufficient to submit a scanned copy of the Registry document as an electronic submittal.

If a Permanent or Temporary Solution Statement relies upon the implementation of an AUL, such Permanent or Temporary Solution is not considered complete or effective until MassDEP has received a Registry copy of the AUL, consistent with 310 CMR 40.1056(2)(g) and 40.1070(3).

Transmittal form BWSC 113 bearing original signatures should be included with the above-referenced submittals. A statement certifying that the property owner identified on the Notice owned the property at the time the Notice was recorded and/or registered, and that record interest holders were notified of the proposed Notice is required pursuant to 310 CMR 40.1074(1)(f). This

statement is provided by checking the appropriate box in Section F of the BWSC 113 transmittal form.

### **5.3 Notice to Current Record Interest Holders**

The property owner must provide written notice of the proposed AUL to any current record interest holder by certified mail, return receipt requested, 30 days prior to the implementation of an AUL, as set forth at 310 CMR 40.1074(1)(e). The purpose of the notification is to identify to such interest holders the terms of the proposed AUL, and the existence and location of the OHM at the property. A copy of the proposed AUL, substantially in the form finally recorded, provides adequate notice and fulfills this requirement.

“Record interest holders” are those individuals or entities having an interest in the property subject to the proposed AUL on record at the Registry of Deeds, Land Registration Office, or Registry of Probate. Examples of record interest holders include, but are not limited to, owners, mortgage holders, lessees or tenants (if lease is recorded or registered), and easements or licenses holders, if such easement or license passes through the AUL area. Please note that a property abutter is not a record interest holder – the abutter must otherwise hold a record interest in the property, as described above.

A record interest is “current” if the interest exists at the time the AUL is recorded. For example, if a mortgage is discharged before the Notice of AUL is recorded, the mortgage holder is not a “current record interest holder.”

The process for identifying record interest holders should include, but not be limited to, searching the Registry of Deeds grantor and grantee indices for the proceeding fifty (50) years for all property within the disposal site. Examining the deed or Certificate of Title (with any memoranda of encumbrances), and any plans for the property is a starting point in identifying record interest holders, but will not provide a complete review. Records at the Probate and Family Court may also provide information about interests which have transferred or been created. Once a record interest holder is identified, additional work may be required to identify that person’s current address and/or successors, to the extent that such information is not clear from the recorded interest itself. MassDEP recommends consulting an experienced real estate attorney or title examiner to conduct these searches.

If the identity of current record interest holders cannot be ascertained upon careful review of all available and relevant records, as described above, a newspaper announcement may be sufficient to fulfill the notice requirement.

If there are no record interest holders to notify, then there is no required 30-day waiting period. If there are record interest holders to notify and time is short, the record interest holder may waive the waiting period [see 310 CMR 40.1074(1)(e)].

There is no requirement to enter into subordination agreements with or to obtain agreement of current record interest holders when an AUL is implemented. However, there are situations where executing such an agreement may be appropriate. A condition of No Significant Risk must be achieved at a disposal site for all current uses, including current uses of current record interest holders. For example, excavation is a current use for a property with an underground utility easement. When the terms of the AUL potentially affect the use of a record interest holder (e.g., by conditions placed on access or excavation), it may be prudent to execute agreements with such interest holders stating that they agree to the terms of the AUL.

It is recommended that copies of the letters sent to record interest holders to provide notice of the AUL be submitted to MassDEP.

#### **5.4 Public Notice Requirements**

AULs and any subsequent Amendments and Terminations are subject to public involvement requirements set forth at 310 CMR 40.1403(7). These requirements establish that within thirty days of recording and/or registering an AUL, a copy of the recorded and/or registered AUL must be provided to the following local officials in the community(ies) in which the property subject to the AUL is located:

- the Chief Municipal Officer;
- the Board of Health;
- the Zoning Official; and
- the Building Code Enforcement Official

In addition, a public notice must also be published in a newspaper that circulates in the community in which the property subject to the AUL is located, indicating that the AUL has been recorded and/or registered. A copy of the public notice must be submitted to MassDEP within seven days of its publication. It is recommended that a scanned copy of the actual newspaper clipping, showing the date of publication, be submitted to MassDEP to confirm its publication. (See *Appendix E, Public Notice of an Activity and Use Limitation*, for the notice format.)

Note that Confirmatory AULs are not subject to the public notice requirements of 310 CMR 40.1403(7).

#### **5.5 Incorporation of AUL into Future Instruments of Transfer**

The AUL and 310 CMR 40.1074(5) require that any “deeds, easements, mortgages, leases, licenses, occupancy agreements, or other instruments of transfer” of an interest in the property or right to use the property incorporate the AUL in full or by reference. Accordingly, any lease, easement, etc. that is created after an AUL has been recorded or registered must either include a copy of the AUL or specifically reference the AUL (by date, Registry, and Instrument/Plan Book and Page Number or Document Number). This requirement is intended to ensure that people with legal rights to use the property, other than the owner, are aware of the existence of the AUL, the specific limitations placed on the use of the property, and conditions and obligations necessary to maintain No Significant Risk.

By way of example, the following statement would be acceptable language to meet this requirement:

“This property is subject to a Notice of Activity and Use Limitation recorded on [date] with the [County] Registry of Deeds in Book [number], Page [number].”

Correcting a violation of failing to reference an AUL in a future instrument of transfer will depend upon the type of instrument involved. Failure to provide such reference in a deed may be remedied by recording with the appropriate Registry of Deeds one of the documents described below. Such document must incorporate the AUL in full or by reference to fulfill the requirement in 310 CMR 40.1074(5), and a copy of the recorded document must be submitted to MassDEP.



- Confirmatory Deed: may only be recorded by the individual who owned the property at the time the AUL was implemented; or
- Affidavit of Title, in accordance with M.G.L. c. 183, §5B: may be recorded by either the current or prior owners.

Amendments to the newly recorded instrument of transfer, in particular, mortgages and leases, are also an acceptable remedy to correct this violation, if all parties agree to the amendment.

**Sale of property:** When the instrument of transfer is a deed, 310 CMR 40.1074(5) requires that a copy of such deed containing the reference to the AUL be submitted to MassDEP within 30 days of such deed being recorded or registered. This requirement attaches to both the buyer and seller of the property; however, submission of the deed copy by either party fulfills the requirement for both parties.

## SECTION 6: MAINTAINING AN AUL

To remain in compliance with the MCP, the owner of a property for which an AUL has been recorded or registered has an ongoing obligation to comply with the terms of the AUL. This section addresses issues and procedures that apply once an AUL has been implemented, including: conducting response actions after a Permanent or Temporary Solution has been submitted; evaluating changes in site uses and activities with respect to an existing AUL; correcting and amending AULs; terminating AULs; referencing AULs in future deeds, lease agreements, and other instruments of transfer; MassDEP audits of disposal sites with AULs; and the consequences of violating the terms of the AUL.

All remedial actions that are conducted after a Permanent or Temporary Solution has been submitted are subject to, at a minimum, the procedures set forth at 310 CMR 40.1067. When such remedial actions are conducted within the area subject to an AUL, the requirements at 310 CMR 40.1067(4) must be followed. These requirements are addressed in Section 6.1.

If a change in Site Activities and/or Uses within the area subject to the AUL is being considered, and the change is not within the uses or activities specifically permitted by the AUL, then the requirements set forth at 310 CMR 40.1080 must be followed. These requirements are summarized in Section 6.2.

### **6.1 Conducting Response Actions after a Permanent or Temporary Solution Statement has been Submitted**

As described at 310 CMR 40.1067(4), remedial actions within the area subject to an AUL must follow specific procedures based on scope and complexity of the remedial actions. These provisions are described below:

- *Limited soil excavation* is described at 310 CMR 40.1067(4) as excavation producing Remediation Waste that does not exceed 100 cubic yards if contaminated solely by oil or waste oil, or 20 cubic yards if contaminated by hazardous materials (or a combination thereof) - may proceed with no notification to MassDEP and no public involvement activities, provided that such excavation is not prohibited by the AUL and the excavated Remediation Waste must be managed in accordance with 310 CMR 40.0030.
- If remedial actions beyond limited soil excavation are planned that fall within the limits set forth at 310 CMR 40.0440 and 40.0442 for RAMs, then remedial actions may be conducted as a RAM. The provisions for RAMs described at 310 CMR 40.0440 must be complied with, including document submission requirements, and the provisions for notification to local officials provided at 310 CMR 40.1403(3).
- All other remedial actions planned within the AUL area must be conducted as a Phase IV Comprehensive Remedial Response Action, pursuant to 310 CMR 40.0870. Such actions must be performed under a valid Tier I or Tier II Classification or Extension, and all public involvement activities applicable to Phase IV Comprehensive Remedial Response Actions must be conducted.

## **6.2 Changes in Site Activities and/or Uses or Other Site Conditions after a Permanent or Temporary Solution Statement with an Activity and Use Limitation has been Submitted**

If a change in Site Activities or Use of the area subject to the AUL is being considered and the new activity or change is not within the uses or activities specifically permitted by the AUL, then an LSP must evaluate the new activities or uses using the MCP risk characterization process [see 310 CMR 40.1080]. This evaluation must determine whether a condition of No Significant Risk would be maintained with the new use or activity or whether additional response actions would be needed to achieve a level of No Significant Risk. An LSP Opinion based on this evaluation must be submitted to MassDEP **before** the change in activity or use takes place and should include documentation of the supporting risk characterization and a response action plan, in accordance with 310 CMR 40.1067, that describes the actions necessary to maintain or achieve a condition of No Significant Risk for the new activity or use. Additional site characterization may be necessary to provide information necessary for the revised risk characterization.

The regulations take a conservative approach by requiring an evaluation of any activity or use that is not specifically permitted in the AUL. In cases where the AUL does not clearly include the contemplated activity or use, an evaluation by an LSP is necessary. This requirement underscores the importance of developing an AUL that addresses the likely range of future activities and uses at a site. “Specifically permitted” does not mean, however, that the exact type of business needs to be listed in the AUL in order for a contemplated use to be considered consistent under the AUL. For example, if the AUL permits “any commercial and industrial uses of the site,” then a change of use from a shoe store to a drug store would be considered consistent or “specifically permitted.” However, where an AUL allows for “commercial and industrial use” and the addition of on-site day care at an industrial facility is being considered, the day care is not clearly included within the broad “commercial and industrial use” description. Consequently, an LSP must evaluate such use using the MCP risk characterization process to determine whether allowing day care on the site would be consistent with maintaining a condition of No Significant Risk.

If, after an evaluation of a change of use and/or activity, a property owner abandons his or her plan to proceed with the change, it is not necessary to submit an LSP Opinion. That is, the submission of the LSP Opinion to MassDEP is only required if the change is to occur.

Keep in mind that both *activities* and *uses* that are not within those listed in the AUL must be evaluated by an LSP. Take for example, a property owner who is not proposing to change the use of the property as a marina, but is proposing to build a warehouse for boat storage. If the AUL for the property does not identify the excavation and construction necessary to build the new structure as an activity consistent with maintaining a condition of No Significant Risk, then an LSP must evaluate these activities. Other situations will require an evaluation of both a change in use and the activities that are needed to prepare the area for the new use. For example, where the only permitted use of the area subject to the AUL is as a paved parking lot, the property owner wishing to landscape a corner of the area for use as an employee picnic area must have an LSP evaluate both the use of the area for picnicking and the activities (asphalt removal and soil excavation related to landscaping) needed to prepare for the change in use.

For activities that involve response actions (e.g., excavation of contaminated soil, treatment or containment measures, or additional testing to better define contaminant levels), Section 6.2.1 below outlines procedures for performing and documenting those actions.

### 6.2.1 If the Contemplated Change in Activities or Uses Involves Response Actions

If the LSP concludes that the new activity and/or use is inconsistent with maintaining a condition of No Significant Risk based on current site conditions and additional response actions are needed before the level of cleanup at the site is sufficient to allow the new use, then, in accordance with 310 CMR 40.1080(2) and 40.1067(4), the procedure below must be followed before undertaking the new use or activity. In this situation, the new use or activity could create a new exposure to contamination remaining at the site; without additional response actions, the site would no longer have a level of No Significant Risk. This procedure would also apply where remedial actions are being conducted to achieve a level of cleanup that allows for unrestricted use of the site, and as a result, the termination of the AUL.

Plans for any response actions required to maintain a condition of No Significant Risk at sites where a Permanent or Temporary Solution that relies upon an AUL has been achieved need to be submitted to MassDEP as described below. These procedures apply to sites where an AUL has been implemented in accordance with 310 CMR 40.1012(3).

1. The LSP Opinion submitted in accordance with 310 CMR 40.1080(1) should specify what additional response actions are necessary to allow for a change in site use or activity or the termination of the AUL. As described at 310 CMR 40.1067(4) and below, response actions that are being conducted to allow a change in Site Activities and Uses may be conducted as either a Release Abatement Measure (RAM) in accordance with 310 CMR 40.0440 or a Phase IV Comprehensive Response Action (Phase IV) in accordance with 310 CMR 40.0870.

Response actions may be conducted as a RAM, if the provisions at 310 CMR 40.0440 limiting the scope of RAMs are not exceeded, and such actions are not within and will not affect an Engineered Barrier. A Tier Classification is not required, but all response actions must be conducted in accordance with 310 CMR 40.0440, including the provisions for submittal of Plans, Status Reports and Completion Statements. In addition, public notice to local officials must be made in accordance with 310 CMR 40.1403(3).

All other response actions – that is, those that are beyond the scope of a RAM or involve an Engineered Barrier – must be conducted as a Phase IV. A valid Tier Classification is required, and all response actions must comply with 310 CMR 40.0870. Public Involvement applicable to Phase IVs must also be completed, as required by 310 CMR 40.1400.

2. The AUL must be amended, terminated, or partially terminated in accordance with 310 CMR 40.1080 and 40.1081 to include the proposed Site Activities or Uses prior to commencing the new or altered Site Activities or Uses; and
3. A revised Permanent or Temporary Solution Statement must be submitted to MassDEP along with supporting documentation to reflect any changes from the previous Permanent or Temporary Solution within 60 days of completion of response actions.

### 6.2.2 If the Contemplated Change in Activities or Uses Does Not Involve Response Actions

If an LSP evaluates a contemplated change in use and concludes that no further response actions are needed to provide for the new use, it is recommended that the AUL be amended to add the contemplated use to the list of uses consistent with maintaining a condition of No Significant Risk or No Substantial Hazard, if the duration of the activity is longer than a few months or is likely to reoccur (i.e., not a one-time event). By doing so, both MassDEP's records and the AUL itself will be current, and future confusion as to whether the terms of the AUL are being met can be avoided.

### **6.3 Correcting Errors in an Implemented AUL**

If a recorded and/or registered AUL contains errors, steps must be taken to correct the errors. Depending on the nature of the error, the correction is made by recording a "Confirmatory AUL," an "AUL Amendment," an "AUL Termination" or by terminating/releasing the original AUL and recording a new corrected AUL. These filings are described in greater detail in the sections below and summarized in Table 6-1. Confirmatory AULs, Amendments, and Terminations must follow the requirements described in Section 5.2 regarding submittals to the MassDEP.

#### **6.3.1 Non-Substantive Errors**

A **Confirmatory Notice** may be used to correct non-substantive errors and omissions in a recorded Notice of AUL, AUL Amendment or Termination. Examples of non-substantive errors include misspelled names, missing lines in the legal description of the parcel and inadvertent omission of one of the required exhibits that must be attached to the AUL. A Confirmatory Notice of AUL is also appropriate in the instance where a consistent or inconsistent use, or an obligation or condition is inadvertently omitted in the AUL form in the respective sections where such activities and uses, or obligations and conditions are specified.

If the AUL applies to registered land, a Confirmatory AUL may NOT be used to correct a non-substantive error, because the Land Court does not accept confirmatory documents. In such cases, errors must be corrected by terminating the original AUL using Form 1084C and filing a new AUL. Under these circumstances, i.e., the original AUL is terminated and a new AUL filed for non-substantive errors that could be remedied with a Confirmatory AUL if land was not registered, the applicable public notification requirements described at 310 CMR 40.1403(7) do not apply.

A Confirmatory AUL cannot be used to add or delete activities or uses that are not supported by the existing AUL. In such cases an Amendment must be implemented to change the activities and uses (see Section 6.4).

To complete a Confirmatory Notice of AUL, the Confirmatory language located in brackets throughout the form must be selected. This includes the bracketed paragraph at the end of the form which states that the document is a confirmatory document executed to correct an inadvertent error made in the original instrument. The error should be specifically identified in this paragraph as well. A Confirmatory AUL must repeat word-for word the language of the original AUL, but should not repeat the error. The error should be deleted and the correct information substituted.

The Confirmatory AUL is read in conjunction with the original AUL, so MassDEP does not require duplication of the exhibits attached to the original AUL – only if an exhibit changes must it be attached to the Confirmatory AUL. However, the rules of the Registry of Deeds or Land Court may require otherwise. For example, while not required by MassDEP, it may be helpful to



include Exhibit A (the metes and bounds description of the property) as an exhibit to the Confirmatory AUL as well as Exhibit B, the sketch plan depicting the location of the restricted area, since both are helpful identify the property and area restricted by the AUL.

A Registry copy of the Confirmatory AUL as recorded must be forwarded to MassDEP within thirty days of recording. The requirements for filing a confirmatory AUL can be found at 310 CMR 40.1085.

Please note that some non-substantive errors may be corrected with an Affidavit of Title, pursuant to M.G.L., c. 183, §5B. Consultation with an experienced real estate attorney is recommended.

### 6.3.2 Substantive Errors

Examples of substantive errors in a recorded AUL include, but are not limited to. the wrong party named as the property owner; the AUL was not signed by all property owners; the property description is for the wrong parcel; the survey and sketch plan requirements were not met; and other errors of this nature.

If substantive errors are discovered in an implemented AUL, the defective AUL must be terminated using Form 1084C, **Termination of Notice of Activity and Use Limitation**, and a new AUL must be recorded. An LSP Opinion is not necessary when terminating an AUL using Form 1084C. Following recording of the AUL Termination and the new AUL, Registry copies of both documents should be forwarded to MassDEP. Additional MCP requirements for filing a termination of AUL can be found at 310 CMR 40.1083(1)(e).

## **6.4 Amendments**

An amendment of an AUL is required where an LSP determines that the terms of the original AUL (i.e., consistent activities and uses, inconsistent activities and uses, or obligations and conditions) need additions or modifications to ensure maintenance of a condition of No Significant Risk.

In situations where additional remedial actions are necessary to achieve a level of No Significant Risk (as described in Section 6.2.1), remedial actions must be completed prior to recording the amendment reflecting the new activity or use.

Amendments to AULs may also be used to increase the area restricted under the AUL when the additional area is located on the same property as the area identified in the original AUL. However, an amendment to an AUL may not be used to decrease the size of the area subject to the AUL. In order to decrease the size of the restricted area, it will be necessary to terminate the AUL, as described below in Section 6.5.

Unlike the Confirmatory AUL (Form 1075) the AUL Amendment form (Form 1082B) only lists those activities and uses that are being “amended.” However, to ensure that all consistent and inconsistent uses of the AUL are clear, MassDEP recommends that all inconsistent uses as well as obligations and conditions be listed on the Form 1082B, even if they are not being changed.

The requirements for amending AULs can be found at 310 CMR 40.1081.

## **6.5 Terminating AULs**

There are numerous scenarios by which a property owner can terminate an AUL. Depending on the reason for termination, terminating a Notice of AUL requires the use of one of four termination forms, as described below:

**Form 1084B:** A property owner can terminate an AUL that is no longer necessary to maintain a condition of No Significant Risk, as determined and documented by an LSP. This scenario is most likely to occur where additional cleanup or other response actions eliminate the need for the AUL. See Section 6.2.1 above on conducting response actions/remedial work prior to recording a release or termination of the AUL. A revised Permanent or Temporary Solution Statement must also be submitted to MassDEP along with supporting documentation to reflect any changes from the previous Permanent or Temporary Solution.

**Form 1083B:** In order to decrease the size of the restricted area, it will be necessary to partially release or terminate the portion of the AUL area. A revised Permanent or Temporary Solution Statement must also be submitted to MassDEP along with supporting documentation to reflect any changes from the previous Permanent or Temporary Solution.

**Form 1084C & Form 1075:** If substantive errors are discovered in an implemented AUL, it is necessary to terminate the defective AUL using Form 1084C, **Termination of Notice of Activity and Use Limitation**, and record a new AUL using Form 1075 (see Section 6.3.2).

**Form 1084D:** If additional response actions are necessary to support a conclusion that a condition of No Significant Risk has been achieved or that all Substantial Hazards have been eliminated, then the AUL must be terminated using Form 1084D. In addition, a Permanent or Temporary Solution Retraction Statement must be submitted to MassDEP because the Permanent or Temporary Solution no longer denotes a condition of No Significant Risk or No Substantial Hazard, and thus is no longer valid.

The requirements for filing a termination of AUL can be found at 310 CMR 40.1083(1)(e).

**Table 6-1: CORRECTING ERRORS IN AN IMPLEMENTED AUL**

<b>Reason for Correcting AUL</b>	<b>Required Form(s)</b>	<b>LSP Stamp &amp; Signature Required?</b>	<b>Permanent or Temporary Solution Revision Required?</b>
Non-Substantive Errors Identified in AUL	Form 1075 (Confirmatory)	Yes	No
Substantive Errors Identified in AUL	Form 1082B (Amendment)	Yes	No
Substantive Errors Identified in AUL recorded on Registered Land	Form 1084C (Termination) & Form 1075	Form 1084C - No Form 1075 - Yes	No
Substantive & Non-Substantive Errors Identified in AUL	Form 1084C (Termination) & Form 1075	Form 1084C - No Form 1075 - Yes	No
AUL no longer needed to maintain condition of No Significant Risk or No Substantial Hazard	Form 1084B (Termination)	Yes	Yes
Reduce area covered by AUL (partial termination)	Form 1083B (Termination)	Yes	Yes
Additional response actions are necessary at site	Form 1084D (Termination)	No	Retract Permanent or Temporary Solution

## **6.6 Incorporation of AUL into Future Instruments of Transfer**

As discussed previously in Section 5.5, the Notice of AUL and 310 CMR 40.1074(5) require that the AUL "be incorporated either in full or by reference into all future deeds, easements, mortgages, leases, licenses, occupancy agreements, or other instruments of transfer." Accordingly, any lease, easement, etc. that is created after an AUL that has been recorded or registered must either include a copy of the AUL or specifically reference the AUL (by date, Registry, and Instrument/Plan Book and Page Number or Document Number). This requirement is intended to ensure that people with legal rights to use the property, other than the owner, are aware of the existence of the AUL, the specific limitations placed on the use of the property, and conditions and obligations necessary to maintain No Significant Risk.

"This property is subject to a Notice of Activity and Use Limitation recorded on [date] at the [county] Registry of Deeds in Book [book #], Page [page #]."

Correcting a violation of failing to reference an AUL in a future instrument of transfer will depend upon the type of document. Failure to provide such reference in a deed may be remedied by recording with the appropriate Registry of Deeds one of the documents described below. Such document must incorporate the AUL in full or by reference to fulfill the requirement in 310 CMR 40.1074(5), and a copy of the recorded document must be submitted to MassDEP.

- Confirmatory Deed: may only be recorded by the individual who owned the property at the time the AUL was implemented; or
- Affidavit of Title, in accordance with M.G.L. c. 183, §5B: may be recorded by either the current or prior owners.

Amendments to the newly recorded instrument (e.g., mortgage, lease) are also an acceptable remedy to correct this violation, if all parties agree to the amendment.

**Sale of Property:** When the instrument of transfer is a deed, 310 CMR 1074(5) requires that a copy of such deed containing the reference to the AUL be submitted to MassDEP within 30 days of such deed being recorded or registered. This requirement attaches to both the buyer and seller of the property, however, submission of the deed copy by either party fulfills the requirement for both parties.

## **6.7 Maintenance Contracts and Property Managers**

While not required by the MCP, where the area subject to the AUL is maintained by a contractor (e.g., landscaper), MassDEP recommends that the maintenance contract/agreement reference the AUL, and its terms be discussed with the contractor to ensure that he/she understands the limitations. By providing this information to the contractor, the property owner helps to ensure that the maintenance workers are aware of and protected from exposure to the remaining contamination. Likewise, any employee of a company located on a site with an AUL who is responsible for managing or maintaining the property should also be familiar with the terms of the AUL.

## **6.8 MassDEP Audits of Disposal Sites with AULs**

The 1998 Brownfields amendments to Chapter 21E require MassDEP to conduct targeted audits at all sites at which an AUL has been implemented. During an audit of a disposal site with an AUL, MassDEP may evaluate whether the AUL has been properly implemented and whether the activities and uses occurring in the area subject to the AUL are consistent with the terms of the AUL as recorded. Further, MassDEP has the authority to initiate an audit of a site with an AUL at any time to determine whether the AUL was properly implemented [see 310 CMR 40.1110(5)]. A disposal site with an AUL may be subject to subsequent audits as long as the AUL remains in effect.

## **6.9 Noncompliance with the Terms of the AUL**

Failure to properly implement or maintain an AUL is a violation of the Permanent or Temporary Solution, and MassDEP may initiate enforcement proceedings under the MCP and M.G.L. c. 21E. Chapter 21A, §16 ("Civil Administrative Penalties") makes failure to maintain the conditions of an AUL subject to a maximum penalty of \$25,000 per violation per day. Chapter 21E, §6 extends liability relief to certain former property owners for violations of an AUL that occur after a property is transferred, provided that the AUL was properly implemented and maintained under the terms of their ownership.

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## **APPENDICES**

<b>APPENDIX A:</b>	<b>TABLE OF REQUIREMENTS FOR AUL SUBMITTALS</b>
<b>APPENDIX B:</b>	<b>AUL IMPLEMENTATION FLOW CHART</b>
<b>APPENDIX C:</b>	<b>STEP BY STEP THROUGH FORM 1075</b>
<b>APPENDIX D:</b>	<b>REQUIRED SIGNATORIES AND DOCUMENTATION</b>
<b>APPENDIX E:</b>	<b>PUBLIC NOTICE OF AN AUL</b>
<b>APPENDIX F:</b>	<b>REQUIREMENTS FOR SURVEY PLANS</b>
<b>APPENDIX G:</b>	<b>MASSACHUSETTS DEED INDEXING STANDARDS</b>
<b>APPENDIX H:</b>	<b>LIST OF AUL RELATED FORMS</b>
<b>APPENDIX I:</b>	<b>AUL COMPLIANCE ASSISTANCE CHECKLIST</b>
<b>APPENDIX J:</b>	<b>GRANTS OF ENVIRONMENTAL RESTRICTION</b>
<b>APPENDIX K:</b>	<b>SAMPLE TITLE CERTIFICATION FOR GRANT</b>

## **APPENDIX A: TABLE OF REQUIREMENTS FOR AUL SUBMITTALS**

**Table of Requirements for AUL Submittals**

<b>Requirement</b>	<b>Notice of Activity and Use Limitation</b>	<b>Grant of Environmental Restriction</b>	<b>Confirmatory Notice</b>	<b>Amendments</b>
AUL Form	1075	1072A	1075	1082B
Notification of Record Interest Holders 30 days prior to implementation	✓			
BWSC Transmittal Form 113	✓	✓	✓	✓
Exhibit A: Legal description of parcel of land containing area subject to AUL	✓	✓	Depending upon correction*	Depending upon correction*
Exhibit A-1: Legal description of area subject to AUL (portion of property)	✓	✓	Depending upon correction*	Depending upon correction*
Exhibit A-2 Plan of area subject to AUL (Registered Land only)	✓	✓	Depending upon correction*	Depending upon correction*
Exhibit B: Sketch plan showing boundaries of area subject to AUL in relation to boundaries of disposal site	✓	✓	Depending upon correction*	Depending upon correction*
Exhibit C: Narrative description of basis for AUL	✓	✓	Depending upon correction*	Depending upon correction*
Exhibit D Documentation of Signatory Authority	✓	✓	Depending upon correction*	Depending upon correction*
Title Certification (See Appendix K)		✓		
Subordination Agreement(s) (Form 1072B)		✓		
Transmittal Form for Application and Payment (Permit Code – BWSC 40)		✓		

\* Only the Exhibits requiring correction must be included. Please note that MassDEP's preference is for all Exhibits to be attached to the Confirmatory.

## **APPENDIX B: AUL IMPLEMENTATION FLOW CHART**

### Step 1

Record plan(s) with  
Registry of Deeds Plan  
Department

#### Survey #1 – Survey Plan of Parcel

Plan Book #  
Plan #

*Note: if registered land, simply reference Land  
Court Plan number in AUL*

#### Survey #2 – Survey Plan of Area Subject to AUL

Plan Book #  
Plan #

*Note: if registered land, Survey #2 should be an  
8 ½" x 11" plan attached to AUL as Exhibit A-2*

### Step 2

Insert recording  
references for survey  
plan(s) into Form 1075  
(see Step 1).  
Record and/or register  
AUL (Form 1075 and  
Exhibits) with Registry of  
Deeds and/or Land  
Registration Office.

Form 1075

Exhibit A  
Meets &  
Bounds of  
Parcel

Exhibit A-1  
Metes &  
Bounds of  
AUL Area  
(portion of  
property)

Exhibit A-2  
Plan of AUL  
area  
(Registered  
Land)

Exhibit B  
Sketch Plan  
of Disposal  
Site

Exhibit C  
Narrative  
Description

Exhibit D  
Signatory  
Authority

Certified  
copy

### Step 3

Submit Registry-certified  
copy of AUL and survey  
plan to MassDEP  
regional office *within 30  
days of Step 2*

Form 1075

A

A-1

A-2

B

C

D

BWSC  
Form  
113  
(original)

Registry  
copy of  
survey  
plan

### Step 4

Provide copy of  
recorded/registered AUL  
to local officials.  
Publish public notice in  
local newspaper of the  
AUL recording/  
registration *within 30  
days of Step 2*

Chief Municipal  
Officer

Board of  
Health

Planning  
Board

Zoning  
Board  
of Appeals

Local newspaper

### Step 5

Submit proof of public  
notification to MassDEP  
*Within 7 days of Step 4*

Proof of Publication in  
Local Newspaper

Proof of Notices to  
Local Officials

### Step 6

Maintain the AUL

Reference AUL in  
future deeds and  
other instruments of  
transfer

MassDEP audits of  
disposal sites with  
AULs

Changes to AUL:

*Amendment  
Confirmatory AUL  
Termination  
Release*



## **APPENDIX C: STEP BY STEP THROUGH FORM 1075**

**Note:** Pursuant to 310 CMR 40.1074(5), upon transfer of any interest in or a right to use the property or a portion thereof that is subject to this Notice of Activity and Use Limitation, the Notice of Activity and Use Limitation shall be incorporated either in full or by reference into all future deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer. Within 30 days of so incorporating the Notice of Activity and Use Limitation in a deed that is recorded or registered, a copy of such deed shall be submitted to the Department of Environmental Protection.

**[CONFIRMATORY] NOTICE OF ACTIVITY AND USE LIMITATION**  
M.G.L. c. 21E, § 6 and 310 CMR 40.0000

Disposal Site Name: \_\_\_\_\_  
DEP Release Tracking No.(s): \_\_\_\_\_

**P. #1** This [Confirmatory] Notice of Activity and Use Limitation ("Notice") is made as of this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by [Name and address of property owner(s)], together with his/her/its/their successors and assigns (collectively "Owner").

W I T N E S S E T H:

**P. #2** WHEREAS, \_\_\_\_\_ (Name of Owner(s)), [is][are] the owner(s) in fee simple of [that][those] certain parcel(s) of [vacant] land located in \_\_\_\_\_ (Town/City), \_\_\_\_\_ County, Massachusetts [with the buildings and improvements thereon], pursuant to [a deed recorded with the \_\_\_\_\_ Registry of Deeds in Book \_\_\_\_\_, Page \_\_\_\_\_]; [source of title other than by deed]; and/or [Certificate of Title No. \_\_\_\_\_ issued by the Land Registration Office of the \_\_\_\_\_ Registry District];

**P. #3** WHEREAS, said parcel(s) of land, which is more particularly bounded and described in Exhibit A, attached hereto and made a part hereof ("Property") is subject to this Notice of Activity and Use Limitation. The Property is shown on [a plan recorded in the \_\_\_\_\_ Registry of Deeds in Plan Book \_\_\_\_\_, Plan \_\_\_\_\_], and/or on Land Court Plan No. \_\_\_\_\_];

**Guidance:** Any terms used to identify the AUL on the survey plan should be consistent with the terms used in the AUL.

**P. #4** optional [WHEREAS, a portion of the Property ("Portion of the Property") is subject to this [Notice of Activity and Use Limitation]. The Portion of the Property is more particularly bounded and described in Exhibit A-1, attached hereto and made a part hereof. The Portion of the Property is shown on [a plan recorded with the \_\_\_\_\_ Registry of Deeds in Plan Book \_\_\_\_\_, Plan \_\_\_\_\_], [and/or on a sketch plan attached hereto and filed herewith for registration];

**Tip:** This "sketch plan" is the Land Court (Registered) Sketch Plan.

**P. #5** WHEREAS, the [Property][Portion of the Property] comprises [all][part of] a disposal site as the result of [a] release[(s)] of oil and/or hazardous material. Exhibit B is a sketch plan showing the relationship of the [Property][Portion of the Property] subject to this Notice of Activity and Use Limitation to the boundaries of said disposal site existing within the limits of the Property and to the extent such boundaries have been established. Exhibit B is attached hereto and made a part hereof; and

**P. #6**

Provide date property owner is signing the Notice.

Provide name of property owner(s). Name should match signature at end of form (including middle initial, if any).

Provide owner's source of title

Attach, as Exhibit A, the legal description of the parcel of land containing area subject to AUL.

Reference survey plan of parcel of land described in Exhibit A in AUL: For registered land, provide Land Court Plan #; for unregistered land, provide plan book and plan #s. If plan for unregistered land is to be recorded at time of recording of AUL, so indicate.

Attach, as Exhibit A-1, a legal description of portion of property subject to AUL. Reference survey plan of portion of property subject to AUL. If registered land, attach as Exhibit A-2, a 8 1/2" by 11" plan of portion of property subject to AUL.

**Tip:** If a survey plan for the entire parcel of land is also being prepared, the two plans can be combined into one.

**Guidance:** A Registry copy of all survey plans referenced in the Notice must be submitted to MassDEP.

Attach, as Exhibit B, a sketch plan showing the relationship of the area subject to the AUL to the boundaries of the disposal site.

WHEREAS, one or more response actions have been selected for the [Disposal Site][Portion of the Disposal Site] in accordance with M.G.L. c.21E ("Chapter 21E") and the Massachusetts Contingency Plan, 310 CMR 40.0000 ("MCP"). Said response actions are based upon (a) the restriction of human access to and contact with oil and/or hazardous material in soil [and/or groundwater] and/or (b) the restriction of certain activities occurring in, on, through, over or under the [Property] [Portion of the Property]. A description of the basis for such restrictions, and the oil and/or hazardous material release event(s) or site history that resulted in the contaminated media subject to the Notice of Activity and Use Limitation is attached hereto as Exhibit C and made a part hereof (Provide the following information in Exhibit C: (a) a statement that specifies why the Notice of Activity and Use Limitation is appropriate to maintain a Permanent Solution and condition of No Significant Risk or maintain a Temporary Solution and condition of No Substantial Hazard; (b) a description of the oil and/or hazardous material release event(s) or site history that resulted in the contaminated media subject to the Notice of Activity and Use Limitation (i.e., date of the release(s), to the extent known, release volumes(s), and response actions taken to address the release(s); and (c) a description of the contaminated media (i.e., media type(s), approximate vertical and horizontal extent) subject to the Notice of Activity and Use Limitation);

*The description should be in narrative form and attached as Exhibit C.*

P. #7 NOW, THEREFORE, notice is hereby given that the activity and use limitations set forth in this Notice of Activity and Use Limitation are as follows:

P. #8 1. Activities and Uses Consistent with Maintaining (select one) [No Significant Risk][No Substantial Hazard] Conditions. The following Activities and Uses are consistent with maintaining (select one) [a Permanent Solution and a condition of No Significant Risk][a Temporary Solution and a condition of No Substantial Hazard] and, as such, may occur on the [Property][Portion of the Property] pursuant to 310 CMR 40.0000:

(i) ;

(ii) ;

(iii) Such other activities or uses which, in the Opinion of a Licensed Site Professional, shall present no greater risk of harm to health, safety, public welfare or the environment than the activities and uses set forth in this Paragraph; and

(iv) Such other activities and uses not identified in Paragraph 2 as being Activities and Uses Inconsistent with maintaining (select one) [No Significant Risk][No Substantial Hazard] Conditions.

**Guidance: Be careful not to inadvertently omit a permitted activity. Omissions may result in the need to amend the AUL.**

P. #9 2. Activities and Uses Inconsistent with (select one) Maintaining [No Significant Risk][No Substantial Hazard] Conditions. The following Activities and Uses are inconsistent with maintaining a (select one) [a Permanent Solution and a condition of No Significant Risk][a Temporary Solution and a condition of No Substantial Hazard] pursuant to 310 CMR 40.0000, and, as such, may not occur on the [Property][Portion of the Property]:

(i) ;

(ii) ; and

(iii) .

**Guidance: Be as specific as possible when identifying Activities and Uses Inconsistent with the AUL Opinion. Vague descriptions may unintentionally result in over restricting the property.**

P. #10

3. Obligations and Conditions. The following obligations and/or conditions are necessary and shall be undertaken and/or maintained at the [Property] [Portion of the Property] to (select one) [maintain a Permanent Solution and a condition of No Significant Risk] [maintain a Temporary Solution and a condition of No Substantial Hazard]:

- (i) ;
- (ii) ; and
- (iii) .

**Guidance: Obligations and Conditions should be clearly spelled out so that current and future interest holders clearly understand what needs to be done to maintain a condition of No Significant Risk or No Substantial Hazard.**

(For a Permanent Solution with Conditions that relies upon the operation and maintenance of an Active Exposure Pathway Mitigation Measure pursuant to 310 CMR 40.1025, include the following in the listed Obligations and Conditions:

- [(i) The Active Exposure Pathway Mitigation Measure comprised of (insert description of the system type) located (specify where on the property the system is located) shall be operated according to the operating regimen specified in the Permanent Solution Statement submitted to the Department of Environmental Protection to ensure a level of No Significant Risk is maintained for the Receptor(s) of concern under normal operating conditions;
- (ii) The Active Pathway Mitigation Measure shall employ remote monitoring technology that alerts the property owner and operator and the Department of Environmental Protection immediately upon loss of power, mechanical failure or other significant disruption of the effectiveness of the system;
- (iii) In the event of any suspension or failure of the Active Exposure Pathway Mitigation Measure immediate steps shall be taken to return the Active Exposure Pathway Mitigation Measure to full operating condition;
- (iv) If such suspension or failure of the system lasts 30 consecutive days, written notice shall be provided to both Department of Environmental Protection and any non-transient building occupant who may have experienced exposure to oil or hazardous material as the result of the system failure or suspension on the 30th day from the start of the suspension or failure period; this notice shall document the reason for the suspension or failure of the system, any efforts taken to resume operation of such Measures, and the expected timeframe for resuming operation of such Measure; and
- (v) . )]

P. #11

4. Proposed Changes in Activities and Uses. Any proposed changes in activities and uses at the [Property] [Portion of the Property] which may result in higher levels of exposure to oil and/or hazardous material than currently exist shall be evaluated by a Licensed Site Professional who shall render an Opinion, in accordance with 310 CMR 40.1080 *et seq.*, as to whether the proposed changes (select one) [are inconsistent with maintaining a Permanent Solution and a condition of No Significant Risk] [are inconsistent with maintaining a Temporary Solution and a condition of No Substantial Hazard]. Any and all requirements set forth in the Opinion to meet the objective of this Notice shall be satisfied before any such activity or use is commenced.

P. #12

5. Violation of a Permanent or Temporary Solution. The activities, uses and/or exposures upon which this Notice is based shall not change at any time to cause a significant risk of harm to health, safety, public welfare, or the environment or to create substantial hazards due to exposure to oil and/or hazardous material without the prior evaluation by a Licensed Site Professional in accordance with 310 CMR 40.1080 *et seq.*, and without additional response actions, if necessary, to maintain a condition of (select one) [No Significant Risk] [No Substantial Hazard].

P. #13

If the activities, uses, and/or exposures upon which this Notice is based change without the prior evaluation and additional response actions determined to be necessary by a Licensed Site Professional in accordance with 310 CMR 40.1080 *et seq.*, the owner or operator of the [Property] [Portion of the Property] subject to this Notice at the time that the activities, uses and/or exposures change, shall comply with the requirements set forth in 310 CMR 40.0020.

P. #14

6. Incorporation Into Deeds, Mortgages, Leases, and Instruments of Transfer. This Notice shall be incorporated either in full or by reference into all future deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer, whereby an interest in and/or a right to use the Property or a portion thereof is conveyed in accordance with 310 CMR 40.1074(5).

**Remember that the Notice must be incorporated either in full or by reference into all future instruments of transfer.**

P. #15

Owner hereby authorizes and consents to the filing and recordation and/or registration of this [Confirmatory] Notice, said [Confirmatory] Notice to become effective when executed under seal by the undersigned Licensed Site Professional, and recorded and/or registered with the appropriate Registry(ies) of Deeds and/or Land Registration Office(s).

P. #16  
optional

[This Confirmatory Notice of Activity and Use Limitation is given to correct the inadvertent error(s) made in the Notice of Activity and Use Limitation dated \_\_\_\_\_, and recorded with the \_\_\_\_\_ Registry of Deeds in Book \_\_\_\_\_, Page \_\_\_\_\_, said error(s) being as follows:

- (i) \_\_\_\_\_;
- (ii) \_\_\_\_\_; and
- (iii) \_\_\_\_\_.

*Include this paragraph if the AUL is a confirmatory document that is to correct errors in a prior AUL. Otherwise, delete this paragraph, including the last line "In all other respects..."*

In all other respects the terms of the Notice of Activity and Use Limitation remain unchanged.]

P. #17

WITNESS the execution hereof under seal this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

**Owner signs first, then the LSP.**

\_\_\_\_\_  
[Name of Owner]

**Guidance: AUL must be signed by all property owners. An LSP may not sign on the property owner's behalf unless he or she has power of attorney from the owner. See Section 4.16 for instructions on signatures from corporations, partnerships, etc.**

COMMONWEALTH OF MASSACHUSETTS  
[STATE OF \_\_\_\_\_]

\_\_\_\_\_, ss

\_\_\_\_\_, 20\_\_\_\_



P. #18

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me, the undersigned notary public, personally appeared \_\_\_\_\_ (name of document signer), proved to me through satisfactory evidence of identification, which were \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

(as partner for \_\_\_\_\_, a partnership)

(as \_\_\_\_\_ for \_\_\_\_\_, a corporation)

(as attorney in fact for \_\_\_\_\_, the principal)

(as \_\_\_\_\_ for \_\_\_\_\_, (a) (the) \_\_\_\_\_)

\_\_\_\_\_ (official signature and seal of notary)

P. #19

The undersigned Licensed Site Professional hereby certifies that in [his][her] Opinion this [Confirmatory] Notice of Activity and Use Limitation is consistent with (select one) [a Permanent Solution and maintaining a condition of No Significant Risk][a Temporary Solution and maintaining a condition of No Substantial Hazard].

Date: \_\_\_\_\_

\_\_\_\_\_  
[Name of Licensed Site Professional]

\_\_\_\_\_  
[Licensed Site Professional SEAL]

COMMONWEALTH OF MASSACHUSETTS  
[STATE OF \_\_\_\_\_]

\_\_\_\_\_, ss

\_\_\_\_\_, 20\_\_\_\_

P. #20

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me, the undersigned notary public, personally appeared \_\_\_\_\_ (name of document signer), proved to me through satisfactory evidence of identification, which were \_\_\_\_\_, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.

(as partner for \_\_\_\_\_, a partnership)

(as \_\_\_\_\_ for \_\_\_\_\_, a corporation)

(as attorney in fact for \_\_\_\_\_, the principal)

(as \_\_\_\_\_ for \_\_\_\_\_, (a) (the) \_\_\_\_\_)

\_\_\_\_\_ (official signature and seal of notary)

P. #21

Upon recording, return to:

(Name and Address of Owner)

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## **APPENDIX D: REQUIRED SIGNATORIES AND DOCUMENTATION**

## **REQUIRED SIGNATORIES AND DOCUMENTATION FOR PROPERTY OWNERS**

The current owner of the property on which the AUL is being placed must sign an the AUL. The property owner is the individual or entity who holds the fee simple interest in the property. When signing on behalf of an entity, documentation verifying signatory authority should be consistent with current conveyancing standards and practices, as described below.

Individual. The property must be signed by the individual who owns the property. If the property is owned by more than one individual (e.g., spouses, siblings, etc.), then all of the owners must sign the AUL.

A ground lessee, not being the owner of the property (i.e., the land itself), may not sign an AUL.

When the property owner is not an individual, but is one of the entities listed below, it is necessary to ensure that the person(s) signing the AUL has the legal capacity, and the power, authority and due authorization to sign on behalf of the entity. The following signatures and documentation are required:

Corporation. The AUL must be signed by a person duly authorized to do so on behalf of the corporation. A corporate vote authorizing the signature on behalf of the corporation must be obtained prior to the date of the signature. A clerk's certificate of the vote, in recordable form, is also required.

For Massachusetts corporations, an exception to the corporate vote requirement exists if the AUL is signed by both an executive officer (e.g., the president or vice-president) and a fiscal officer (e.g., the treasurer or assistant treasurer). One person may hold both types of offices [see MGL c. 155, §8].

A corporate clerk's Certificate of Incumbency is required to confirm that the person(s) signing the AUL held holds his or her respective offices as identified on the date the AUL was signed. If the AUL is being signed by both the president or vice president and the treasurer or assistant treasurer, then the Certificate of Incumbency is all that is required for the exhibit. If an individual holds both the office of president and treasurer, then the one signature is sufficient. If only one officer is signing the AUL, or if the officers have delegated authority to sign to another individual (such as a director), then the exhibit must also include a Clerk's Certificate. The Certificate must be signed by the clerk or the secretary of the corporation, and must document a corporate vote, resolution, or by-law granting the individual authority to bind the corporation in real estate transactions (or, more specifically, authority to sign the AUL).

Limited Partnership. The General Partner of a Limited Partnership must sign the AUL, unless the limited partnership agreement authorizes another party to sign. Documentation indicating who is the general partner must be attached as an exhibit to the AUL. If the partnership agreement authorizes another party to sign, then the agreement (or relevant portion thereof) must also be attached as an exhibit to the AUL.

Limited Liability Company ("LLC"). The person(s) named in the Certificate of Organization of a Massachusetts LLC (or on the application for registration of a foreign limited liability

company) as a manager/member or a person authorized to execute, acknowledge, deliver, and record instruments affecting interests in real estate documents in real property, such as an AUL, must sign the AUL. The portion of the Certificate of Organization identifying the authorized signatories must be attached as an exhibit to the AUL. If the property is registered land, the Long Form of Certificate of Good Standing is also required by the Land Court.

Limited Liability Partnership ("LLP"). The person(s) authorized in the partnership agreement registration to execute real estate documents must sign the AUL on behalf of the LLP. The partnership agreement (or relevant portion thereof) must be attached as an exhibit to the AUL.

Condominium. For an AUL affecting Common Area property, authorized trustees and directors may sign the AUL if documents are of record at the Registry of Deeds authorizing the trustees or directors of a condominium to execute documents which affect a Common Area on behalf of the unit owners. The documents authorizing the trustees or directors to execute the AUL must be attached as an exhibit to the AUL. If no such document exists on record, then all the unit owners must sign the AUL. If the area subject to the AUL is on one or more condominium units, but does not affect any portion of any Common Area, then only the affected unit owner(s) must sign the AUL.

Trusts. If title to the property subject to the AUL is held by the trustee(s) of a trust, then the AUL must be signed by the trustee(s) authorized under the Declaration of Trust to execute real estate documents. The relevant portion(s) of the Declaration of Trust must be attached as an exhibit to the AUL, unless it is already on record. If the Declaration of Trust is already recorded at the Registry of Deeds, the exhibit evidencing the signatory authority of the trustee can make reference to the Book and Page of where the Declaration of Trust is recorded. In this case, a copy of the recorded Declaration of Trust should be submitted to the MassDEP with the AUL submittal.

The Declaration of Trust will establish the type of trust (e.g., nominee, inter vivos, business). If a business trust, information may be available at the Secretary of State's Office. (<http://corp.sec.state.ma.us/corpweb/corpsearch/CorpSearch.aspx>)

The first step in obtaining a copy of the Declaration of Trust is to determine if it has been recorded at the appropriate Office of the Registry of Deeds (<http://www.masslandrecords.com>)

Note, however, that not all Declaration of Trusts are recorded. For example, a nominee trust does not require that the Declaration of Trust be recorded [see M.G.L. c. 203, §2]. The deed conveying title to the trustee of a nominee trust may refer to a Declaration of Trust, but may not include any additional information. In such cases, a notarized Trustee's Certificate should be obtained from the trustee. The Trustee's Certificate verifies the existence of the Declaration of Trust, whether it has been amended, the identity of the current trustees or beneficiaries, and the trustee's authority to act with respect to the subject property.

Note also that subsequent trust documents, such as amendments, and appointments, resignations, and removal of trustees may not be recorded at the Registry of Deeds.

State Agencies: The department head, typically the Commissioner or his/her designee, is authorized to sign on behalf of the agency.



Municipality. The chief municipal officer(s) of a city or town must sign an AUL that affects municipally owned property. Specifically, the Board of Selectmen (or a majority of members of the board) should sign in the case of town-owned property. Depending upon the type of charter held, the Mayor or City Manager should sign in the case of city-owned property. Heads of municipal departments cannot sign the AUL (e.g., the Chief of the Department of Public Works (DPW) is not an authorized signatory on the AUL affecting the DPW garage site). Documentation stating that the individual signing the AUL is the appropriate office holder must be attached as an exhibit to the AUL.

LSP Signing on Behalf of Property Owner. An LSP may not sign an AUL on behalf of the property owner without first obtaining a power of attorney authorizing him or her to do so. The power of attorney must be recorded with the AUL.

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## **APPENDIX E: PUBLIC NOTICE OF AN ACTIVITY AND USE LIMITATIONS**

**[NOTICE OF ACTIVITY AND USE LIMITATION]  
or [GRANT OF ENVIRONMENTAL RESTRICTION]**

**[SITE NAME]  
[SITE ADDRESS]  
[RELEASE TRACKING NUMBER]**

A release of oil and/or hazardous materials has occurred at this location, which is a disposal site as defined by M.G.L. c. 21E, § 2 and the Massachusetts Contingency Plan, 310 CMR 40.0000. On **[DATE]**, **[NAME OF PERSON RECORDING AND/OR REGISTERING THE NOTICE or GRANT]** **[recorded with the \_\_\_\_\_ County Registry of Deeds and/or registered with the Land Registration Office of the \_\_\_\_\_ Registry District]** a **[NOTICE OF ACTIVITY AND USE LIMITATION] [GRANT OF ENVIRONMENTAL RESTRICTION]** on the disposal site, pursuant to 310 CMR 40.1070 through 40.1080.

The **[GRANT OF ENVIRONMENTAL RESTRICTION] [NOTICE OF ACTIVITY AND USE LIMITATION]** will limit the following site activities and uses on the above property:

**[ List inconsistent/restricted activities and uses ]**

Any person interested in obtaining additional information about the **NOTICE OF ACTIVITY AND USE LIMITATION] [GRANT OF ENVIRONMENTAL RESTRICTION]** may contact **[NAME OF PERSON RECORDING AND/OR REGISTERING THE GRANT OR NOTICE OR SUCH PERSON'S REPRESENTATIVE, NAME OF ORGANIZATION, ADDRESS, TELEPHONE NUMBER]**.

The **[NOTICE OF ACTIVITY AND USE LIMITATION] [GRANT OF ENVIRONMENTAL RESTRICTION]** and the disposal site file can be viewed at MassDEP website using Release Tracking Number (RTN) **[RTN]** at <http://public.dep.state.ma.us/SearchableSites2/Search.aspx> or at **[MassDEP, REGIONAL OFFICE ADDRESS, TELEPHONE NUMBER]**.

**NOTICE OF [AMENDMENT, RELEASE OR TERMINATION] OF ACTIVITY AND USE  
LIMITATION**

**[SITE NAME]  
[SITE ADDRESS]  
[RELEASE TRACKING NUMBER]**

A release of oil and/or hazardous materials has occurred at this location, which is a disposal site as defined by M.G.L. c. 21E, § 2 and the Massachusetts Contingency Plan, 310 CMR 40.0000. On **[DATE]**, **[NAME OF PERSON RECORDING AND/OR REGISTERING THE AMENDMENT, RELEASE OR TERMINATION]** [recorded with the \_\_\_\_\_ County Registry of Deeds *and/or* registered with the Land Registration Office of the \_\_\_\_\_ Registry District] an **[AMENDMENT, RELEASE OR TERMINATION]** of a **[NOTICE OF ACTIVITY AND USE LIMITATION]** **[GRANT OF ENVIRONMENTAL RESTRICTION]** on the disposal site, pursuant to 310 CMR 40.1080 through 40.1084. The **[NOTICE OF ACTIVITY AND USE LIMITATION]** **[GRANT OF ENVIRONMENTAL RESTRICTION]** was originally recorded and/or registered on **[DATE]**.

The AMENDMENT **[this paragraph is only applicable if an amendment is involved]** to the **[NOTICE OF ACTIVITY AND USE LIMITATION]** **[GRANT OF ENVIRONMENTAL RESTRICTION]** is as follows:

**[Listed the amended information]**

Any person interested in obtaining additional information about the **[NOTICE OF ACTIVITY AND USE LIMITATION]** **[GRANT OF ENVIRONMENTAL RESTRICTION]** may contact **[NAME OF PERSON RECORDING AND/OR REGISTERING THE GRANT OR NOTICE OR SUCH PERSON'S REPRESENTATIVE, NAME OF ORGANIZATION, ADDRESS, TELEPHONE NUMBER]**.

The **[AMENDED, RELEASED OR TERMINATED]** **[GRANT OF ENVIRONMENTAL RESTRICTION OR NOTICE OF ACTIVITY AND USE LIMITATION]** and the disposal site file can be viewed at MassDEP website using Release Tracking Number (RTN) **[RTN]** at <http://public.dep.state.ma.us/SearchableSites2/Search.aspx> or at **[MassDEP, REGIONAL OFFICE ADDRESS, TELEPHONE NUMBER]**.



## **APPENDIX F: REQUIREMENTS FOR SURVEY PLANS**

### **Requirements for Survey Plans**

Amendments under the General Laws, Chapter 36, Section 13A, approved by the Attorney General are as follows:

1. Plan sizes shall be a minimum of 8 1/2" by 11" and a maximum of 24" by 36".
2. Plans being presented for recording shall be on linen or polyester film ("mylar"), single matte with a thickness of 0.003 or 3 mils, and must have an opacity so as to allow consistent computer scanning and Diazo and microfilm reproduction.
3. All plans shall be prepared using a compatible ink with excellent cohesiveness which will produce a permanent bond and result in a plan with long term durability. All signatures must be in black India ink or its equal.
4. Linen or polyester reproductions shall be accepted for recording provided they contain original signatures and comply with the other requirements for the recording of plans.
5. Each plan shall have 3/4" borders.
6. The minimum letter size on plans presented for recording shall be 1/8" if free-hand lettering is used and 1/10" if lettering guides are used.
7. Each plan presented for recording shall include a graphic scale.
8. Each plan shall have an area reserved to receive planning board recitation or contain a surveyor's certification as per Chapter 380, Acts of 1966 (G.L. c. 41, s. 81x).
9. Each sheet of plan shall have a 3 1/2" square reserved for Registry use.
10. Each plan must contain a certification clause signed by the preparer stating that he/she has conformed with the rules and regulations of the Registers of Deeds in preparing the plan.
11. No tape adhesion or the like shall be placed on any plan presented for recording or registration. Plans presented for recording shall not contain any raised print.

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**APPENDIX G: MASSACHUSETTS DEED INDEXING STANDARDS DOCUMENT**  
**FORMATTING STANDARDS**

## **Massachusetts Deed Indexing Standards Document Formatting Standards**

Documents recorded after January 1, 2008 must meet the following requirements, as described in "Massachusetts Deed Indexing Standards, Version 4.0, January 1, 2008":

1. Be on white paper of sufficient weight to reproduce in registry scanners.
2. All document pages and attachments must be on paper that is no larger than 8.5 inches by 14 inches.
3. Printing shall be on one side only; double-sided pages will not be accepted.
4. Documents that contain printing, writing or other markings must be sufficiently dark in appearance to be legibly reproduced on standard registry scanners.
5. All printing and writing on a document must be of sufficient size to be legibly reproduced on standard registry scanners.
6. Margins on all sides of all document pages must be of sufficient size to be legibly reproduced on standard registry scanners.
7. The first page of all documents must contain a "recording information area" in the upper right hand corner measuring three inches from the top edge of the document and three inches from the right edge of the document that is free from all writing or printing.
8. Documents that do not comply with Formatting Standard 7 above may still be recorded when attached to an official registry Document Cover Sheet or through the use of some other method adopted by the registry.

## **APPENDIX H: LIST OF AUL RELATED FORMS**



## List of AUL-Related Forms

### BWSC Transmittal Forms:

BWSC-113: Activity and Use Limitation (AUL) Transmittal Form  
Transmittal Form for Application and Payment (For Grants only)

### MCP Forms for Activity and Use Limitations:

- 1072A: Grant of Environmental Restriction
- 1072B: Subordination Agreement
- 1075: Notice of Activity and Use Limitations
- 1082A: Amendment to Grant of Environmental Restriction
- 1082B: Amendment to Notice of Activity and Use Limitations
- 1083A: Partial Release of Grant of Environmental Restriction
- 1083B: Partial Termination of Notice of Activity and Use Limitation
- 1084A: Release of Grant of Environmental Restriction (pursuant to 310 CMR 40.1083(1)(a))
- 1084B: Termination of Notice of Activity and Use Limitation (pursuant to 310 CMR 40.1083(1)(a); termination because the AUL is no longer necessary)
- 1084C: Termination of Notice of Activity and Use Limitation (pursuant to 310 CMR 40.1083(1)(b); termination to substitute with a new AUL)
- 1084D: Termination of Notice of Activity and Use Limitation (pursuant to 310 CMR 40.1083(1)(c); termination to conduct response actions to meet NSR, or NSH)
- 1084E: Release of Grant of Environmental Restriction (pursuant to 310 CMR 40.1083(1)(c); release to conduct response actions to meet NSR, or NSH)

**NOTE: The AUL forms that appear in the MCP are revised periodically. Please make sure that you use the most current version of these forms when preparing an AUL.**

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## **APPENDIX I: AUL COMPLIANCE ASSISTANCE CHECKLIST**

## AUL COMPLIANCE ASSISTANCE CHECKLIST

### *Checklist for Notice of Activity and Use Limitation -- Form 1075*

NOTE: This checklist is intended to assist parties in preparing and implementing Notices of Activity and Use Limitation (AULs) using Form 1075. This checklist is intended solely as guidance, and is not a substitute for the regulations. Parties implementing AULs should carefully consult 310 CMR 40.0000 (the MCP) for general and AUL-specific regulatory requirements.

REQUIREMENTS FOR COMPLETING FORM 1075	Circle one		Reference(s) to MCP, Form	Notes
1. Is the current version of the Form 1075 being used (published 4/25/14 and effective 6/20/14)?	Y	N	40.1074(1)(a)	
2. Is the Form's boilerplate unaltered, except where alterations are allowed through bracketed language?	Y	N	40.1074(1)(a)	
3. Is the Disposal Site name (if applicable) identified in the Header of Form 1075?	Y	N	Not Applicable	40.1074(2)(d)
4. Is the Release Tracking Number(s) identified in the Header of Form 1075?	Y	N		40.1074(2)(d)
5. Does the Form identify, in Paragraph 1, the date on which the property owner(s) signed the AUL?	Y	N	Form 1075	
6. Is (are) the name(s) of the property owner(s) identified, in the following locations? <div> <div>___ Paragraph 1</div> <div>___ Paragraph 2</div> <div>___ Paragraph 21 (this paragraph may reference the property owner or an authorized representative)</div> </div>	Y	N	40.1074(2)(b) Form 1075	
7. Is (are) the name(s) of property owner(s) consistent in all locations?	Y	N	Form 1075	
8. Is (are) the address(es) of the property owner(s) identified in Paragraph 1?	Y	N	Form 1075	
9. Does the Form indicate, through use of bracketed language in Paragraph 2, whether land is vacant or improved?	Y	N	Form 1075	

10. Is the address of the Property subject to the AUL identified (Street Address, City/Town & County) in Paragraph 2?	Y	N		40.1074(2)(a)1	
11. In Paragraph 2, does the Form identify the owner's source of title (i.e. deed, Certificate of Title, probate docket number)?	Y	N		Form 1075	
12. In Paragraph 3, is reference made to a survey plan of the Property? (Indicate the form of reference below)  <input type="checkbox"/> Registry of Deeds, Plan Book & Plan Number (if Property is recorded land) <input type="checkbox"/> Land Court Plan Number (if Property is registered land)	Y	N		40.1074(2)(a)3	
13. Is it clear that the AUL applies to the entire Property, or only to a Portion of the Property?  <input type="checkbox"/> Entire Property <input type="checkbox"/> Portion of the Property	Y	N		40.1074(2)(a)4	
14. If AUL applies to only a Portion of the Property, is optional Paragraph 4 properly included?	Y	N		Form 1075	
14A. If yes, is a reference to the Book and Page (recorded land) included?	Y	N	Not Applicable (registered land)	40.1074(2)(a)4.b	
15. Is bracketed language selected in the following locations, indicating whether the AUL applies to the entire Property or only to a Portion of the Property (check all that apply)?  <input type="checkbox"/> Paragraph 5 (twice) <input type="checkbox"/> Paragraph 6 <input type="checkbox"/> Paragraph 8 <input type="checkbox"/> Paragraph 9 <input type="checkbox"/> Paragraph 10 <input type="checkbox"/> Paragraph 11 <input type="checkbox"/> Paragraph 13	Y	N		Form 1075	

16. Is bracketed language indicating Property or Portion of Property consistent in all locations?	Y	N		Form 1075	
17. Is it clear that the area subject to the AUL comprises the entire Disposal Site, or only a Portion of the Disposal Site? ___ Entire Disposal Site ___ Portion of Disposal Site	Y	N		Form 1075	
18. Is bracketed language selected in the following locations, indicating whether the area subject to the AUL comprises the entire Disposal Site or only a portion of the Disposal Site? ___ Paragraph 5 ___ Paragraph 6	Y	N		Form 1075	
19. Is bracketed language indicating entire Disposal Site/Portion of Disposal Site consistent in all locations?	Y	N		Form 1075	
20. In Paragraph 5, is reference made to a sketch plan, attached as Exhibit B, showing the relationship of the Disposal Site to the Property or Portion of Property subject to the AUL?	Y	N		40.1074(2)(a)5.	
21. Is bracketed language selected in the following locations, indicating whether the purpose of the AUL is to maintain a condition of NSR, or to maintain a condition of NSH? ___ Paragraph 8 ___ Paragraph 10 ___ Paragraph 11	Y	N		40.1074(2)(e) Form 1075	
22. Is language indicating NSR or NSH consistent in all locations?	Y	N		Form 1075	
23. In Paragraph 8, does the Form include a description of permitted activities and uses?	Y	N		40.1074(2)(h)	
24. Is the description of permitted activities and uses written in a clear and understandable manner?	Y	N		40.1074(2)(h)	



24A. If yes, is the description of consistent activities and uses written in a clear and understandable manner?	Y	N		40.1074(2)(h)	
25. In Paragraph 9, does the Form include a description of inconsistent activities and uses?	Y	N		40.1074(2)(i)	
25A. If yes, is the description of inconsistent activities and uses written in a clear and understandable manner?	Y	N		40.1074(2)(i)	
26. Does AUL identify use of a private well as a drinking water source as an inconsistent use pursuant to 310 CMR 40.0932(5)(d)1.c?	Y	N	Not Applicable	40.0932(5)(d)1.c	
27. In Paragraph 10, does the Form include a description of obligations and conditions?	Y	N		40.1074(2)(j)	
31A. If yes, is the description of obligations and conditions written in a clear and understandable manner?	Y	N	Not Applicable	40.1074(2)(j)	
28. Are the descriptions of consistent (permitted) activities and uses, inconsistent activities and uses, and obligations and conditions consistent with each other?	Y	N		40.1074(2)(h, I, j)	
29. Is the Form signed by the property owner(s) in Paragraph 17?	Y	N		40.1074(2)(m)	

<p>30. Is (are) the property owner(s)'s signature authorized and binding? (Check one of the options below)</p> <p><input type="checkbox"/> Sole ownership: signed by sole owner</p> <p><input type="checkbox"/> Joint ownership: signed by all owners</p> <p><input type="checkbox"/> Trust: Signed in accordance with requirements established by the trust document</p> <p><input type="checkbox"/> Corporation: Certificate of incumbency AND (Check one)</p> <p><input type="checkbox"/> Signed by President and Treasurer</p> <p><input type="checkbox"/> Signed by President and Assistant Treasurer</p> <p><input type="checkbox"/> Signed by Vice President and Treasurer</p> <p><input type="checkbox"/> Signed by Vice President and Assistant Treasurer</p> <p><input type="checkbox"/> Signed by other person(s) authorized by vote of the Board of Directors, with vote authorizing said officer(s) attached to Form</p> <p><input type="checkbox"/> Limited Partnership: signed by General Partner or person authorized by LP agreement</p> <p><input type="checkbox"/> Limited Liability Company: signed by manager or member authorized in Certificate of Organization to sign real estate documents</p> <p><input type="checkbox"/> Limited Liability Partnership: signed by person authorized in partnership agreement registration to sign real estate documents</p> <p><input type="checkbox"/> Other (explain): _____</p> <p>_____</p>	Y	N		40.1074(2)(m) Form 1075	
<p>31. Is (are) the property owner(s)'s signature dated in Paragraph 17?</p>	Y	N		Form 1075	

<p>32. Is (are) the property owner(s)'s signature(s) properly notarized (i.e., are each of the following requirements met) in Paragraph 18?</p> <p>___ All signatures are notarized</p> <p>___ State and county of notary are identified</p> <p>___ Property owner(s) is/are named in notary block</p> <p>___ Notary signature is present</p> <p>___ Notary signature is dated</p> <p>___ Notary seal or stamp is included (required for out-of-state notary; not required for Massachusetts notary)</p>	Y	N		40.1074(2)(m)	
33. Is the Form signed by an LSP in Paragraph 19?	Y	N		40.1074(2)(m)	
34. Is the LSP's signature dated in Paragraph 19?	Y	N		40.0015(1)	
<p>35. Is the LSP's signature dated on or after (not before) the date of owner's signature?</p> <p>_____ Date of LSP's signature</p> <p>_____ Date of Owner's signature</p>	Y	N	One or both dates missing	Form 1075	
36. Is LSP's signature sealed with LSP stamp?	Y	N		40.1074(2)(m)	
<p>37. Is the LSP's signature properly notarized (i.e., are each of the following requirements met) in Paragraph 20?</p> <p>___ State and county of notary are identified</p> <p>___ LSP is named in notary block</p> <p>___ Notary signature is present</p> <p>___ Notary signature is dated</p> <p>___ Notary seal or stamp is included (required for out-of-state notary; not required for Massachusetts notary)</p>	Y	N		40.1074(2)(m) Form 1075	

CONFIRMATORY AUL LANGUAGE	Circle One			Reference(s)	Notes
38. Is the AUL a Confirmatory Notice of Activity and Use Limitation?	Y	N	Not Applicable	40.1085(1)	
39. Is the word "Confirmatory" appropriately included or omitted in the following locations, to indicate whether the AUL is a Confirmatory Notice of Activity and Use Limitation? ____ Header ____ Paragraph 1 ____ Paragraph 15 ____ Paragraph 19	Y	N	Not Applicable	Form 1075	
40. Is optional Paragraph 16 appropriately included to indicate the AUL is a Confirmatory Notice of Activity and Use Limitation?	Y	N	Not Applicable	40.1085(4)(a) Form 1075	
41. Does Paragraph 16 identify the date, Registry, book and page number of the original AUL?	Y	N	Not Applicable	Form 1075	
42. Are the errors in the original AUL listed in Paragraph 16?	Y	N	Not Applicable	Form 1075	
43. Are the Confirmatory Exhibits accurately attached to the Confirmatory AUL? (For example, documentation of signatory authority attached as Exhibit D)	Y	N	Not Applicable	Form 1075	
<b>REQUIRED ATTACHMENTS TO FORM 1075</b>					
EXHIBITS A, A-1, A-2 – Legal Descriptions of Property, Survey Plans	Circle One			Reference(s)	Notes
44. Is a legal description of the Property subject to the AUL (either a running description or a bounding description) attached as Exhibit A? (Check one): ____ Running (metes & bounds) description (if Property is recorded land) ____ Bounding description (if Property is registered land)	Y	N		40.1074(2)(a)2.	

45. If only a Portion of the Property is subject to the AUL, is a legal description of that Portion (metes and bounds description) attached as Exhibit A-1? (Applies to either/both recorded and registered land)	Y	N	Not Applicable (entire Property subject to AUL)	40.1074(2)(a)4.	
46. If Property is registered and only a Portion of the Property is subject to the AUL, is an 8.5" x 11" survey plan of the restricted Portion attached as Exhibit A-2?	Y	N	Not Applicable (entire Property is subject to AUL, or is recorded)	40.1074(2)(a)4.a	
47. If the Property is registered, and only a Portion of the Property is subject to the AUL, does the description of the Portion subject to the AUL (Exhibit A-1) conform to the survey plan (Exhibit A-2)?	Y	N	Not Applicable (entire Property is subject to AUL, or is recorded)	Form 1075	

EXHIBIT B – Sketch Plan				Reference(s)	Notes
48. Is a sketch plan attached as Exhibit B?	Y	N		40.1074(2)(a)5.	
49. Does the sketch plan clearly illustrate the relationship of the area subject to the AUL to the boundaries of the Disposal Site?	Y	N		40.1074(2)(a)5.	
50. Is the sketch plan consistent with the Form (e.g. if the Form indicates that only a Portion of the Property is restricted, does the sketch plan conform)?	Y	N		Form 1075	
EXHIBIT C – Narrative Description				Reference(s)	Notes
51. Is a Narrative Description of the basis for the AUL attached as Exhibit C?	Y	N		40.1074(2)(e-g)	
52. Does Narrative Description specify why AUL is appropriate to achieve and/or maintain a condition of No Significant Risk or No Substantial Hazard?	Y	N		40.1074(2)(e)	
53. Does Narrative Description contain a concise summary of the release events?	Y	N		40.1075(2)(f)	
54. Does Narrative Description identify the: (Check all that apply) ____ contaminated media (soil/groundwater/indoor air/surface water) ____ OHM (chlorinated solvents, VOCs, petroleum hydrocarbon, metals, etc.) ____ vertical and horizontal extent of contamination?	Y	N		40.1075(2)(g)	
EXHIBIT D – SIGNATORY AUTHORITY				Reference(s)	Notes
55. If the person signing the AUL is not an individual signing on his/her own behalf, is there documentation of the person's signatory authority attached as an exhibit to the AUL? (See AUL Guidance Section 4.8 and 4.13)	Y	N	Not Applicable (individual(s) signing on his/her/their own behalf)	40.1074(2)(c)	



CONSISTENCY OF FORMS & ATTACHMENTS				Reference(s)	Notes
56. If the land is recorded, does the legal description of the Property containing the area subject to the AUL (Exhibit A) conform to the survey plan of the Property?	Y	N	Not Applicable (Property is registered land)	Form 1075	
57. If the land is registered, does the legal description of the Property containing the area subject to the AUL (Exhibit A) conform to the Land Court Plan of the Property?	Y	N	Not Applicable (Property is recorded land)	Form 1075	
58. If land is recorded and only a portion of the Property is subject to the AUL, does the legal description of the Portion of the Property (Exhibit A-1) conform to the survey plan of the Portion?	Y	N	Not Applicable (entire Property is subject to AUL, or Property is registered land)	Form 1075	.
PUBLIC NOTICE REQUIREMENTS				Reference(s)	Notes
59. Was a copy of the Form forwarded to each of the local officials listed below within 30 days of being recorded or registered? <input type="checkbox"/> Chief Municipal Officer <input type="checkbox"/> Board of Health <input type="checkbox"/> Zoning Official <input type="checkbox"/> Building Code Enforcement Official	Y	N		40.1403(7)(a) BWSC Form 113	
60. Was a notice of the AUL published in a local newspaper within 30 days of the AUL being recorded or registered, identifying the following? <input type="checkbox"/> The name, complete address, and RTN of the Disposal Site <input type="checkbox"/> The type of Activity and Use Limitation (i.e., Notice of AUL) <input type="checkbox"/> Information about where the AUL and site file can be reviewed <input type="checkbox"/> The name, address and phone number of the person(s) recording the AUL	Y	N		40.1403(7)(b) BWSC Form 113	

BWSC TRANSMITTAL FORM 113				Reference(s)	Notes
61. Is the following information about the Disposal Site included? <input type="checkbox"/> Release Tracking Number <input type="checkbox"/> Disposal Site name (if applicable) <input type="checkbox"/> Disposal Site address	Y	N		BWSC Form 113	
62. Is the address of the Property subject to AUL identified, if different from the address of the Disposal Site?	Y	N	Not Applicable (addresses of Property and Disposal Site are the same)	BWSC Form 113	
63. Is a box checked to indicate what Form is being submitted?	Y	N		BWSC Form 113	
66. Is the following information about the recording of the AUL included? <input type="checkbox"/> Date AUL was recorded or registered <input type="checkbox"/> Registry of Deeds where AUL was recorded or registered <input type="checkbox"/> One of the following: <input type="checkbox"/> Instrument Number (recorded land only) <input type="checkbox"/> Book and Page Number (recorded land only) <input type="checkbox"/> Land Court Document Number (registered land only)	Y	N		BWSC Form 113	
64. Is the following information about the person/organization submitting the Transmittal Form included? <input type="checkbox"/> Name of person/organization <input type="checkbox"/> Contact person (if Transmittal Form 113 is submitted by an organization) <input type="checkbox"/> Address <input type="checkbox"/> Telephone number <input type="checkbox"/> Fax number (if applicable)	Y	N		BWSC Form 113	

65. Is the following information about the property owner(s) included, if property owner is different from person/organization submitting Transmittal Form? ___Name(s) ___Addresses(s) ___Telephone number(s) ___Fax number(s) (if applicable)	Y	N	Not Applicable (Transmittal Form 113 submitted by property owner(s))	BWSC Form 113	
66. Is a box checked indicating the relationship of the person submitting Transmittal Form 113 to the Disposal Site?	Y	N		BWSC Form 113	
67. Is the Transmittal Form signed, dated and certified by person submitting Transmittal Form?	Y	N		BWSC Form 113	
68. Is the signature dated on or after (not before) the date the AUL was recorded or registered?	Y	N		BWSC Form 113	
69. Is the following information about the person providing certification included, if not already provided earlier in the Transmittal Form? ___Name ___Addresses ___Telephone number ___Fax number (if applicable)	Y	N	Not Applicable (information already provided)	BWSC Form 113	
70. Has a certification been made that the person(s) or entity(ies) identified as the owner(s) on the AUL owned the Property at the time the AUL was recorded and/or registered?	Y	N		40.1074(1)(e)1 BWSC Form 113	
71. Has the person(s) signing the AUL certified that record interest holders were notified pursuant to 40.1074(1)(e), or that there are no such holders?	Y	N		40.1074(1)(e)2. BWSC Form 113	
72. At least 30 days prior to recording and/or registration of the AUL, were all current record interest holders, if any, notified, by certified mail, return receipt requested, of the existence and location of OHM within the AUL area, and the terms of the proposed AUL (or did such holders waive the prior notification)?	Y	N	No record interest holders	40.1074(1)(d)	

SUBMITTAL OF AUL DOCUMENTATION TO MassDEP				Reference(s)	Notes
73. Was the AUL recorded and/or registered at the Registry of Deeds?	Y	N		40.1074(3)	
74. Within 30 days of recording and/or registering the AUL, was a Registry copy of the AUL with proof of recording/registration sent to MassDEP? Check the applicable option below that represents proof or recording/registration: ____ AUL marked with a Registry stamp indicating an Instrument Number (if Property is recorded land and Book and Page Number have not yet been assigned) ____ AUL marked with a Registry stamp indicating a Book and Page Number (if Property is recorded land and Book and Page Number have been assigned) ____ AUL marked with a Land Registration stamp indicating a Land Registration Document Number (if Property is registered land)	Y	N		40.1074(4)(a)	
75. Within 30 days of recording and/or registering the AUL, was a registry copy of the required survey plan(s) referenced in the AUL, bearing the plan book and plan numbers, sent to MassDEP?	Y	N		40.1074(4)(b)	

## **APPENDIX J: GRANTS OF ENVIRONMENTAL RESTRICTION**

## Grants of Environmental Restriction

The Grant of Environmental Restriction has important similarities to the Notice of Activity and Use Limitation. Both the Grant and Notice document that a release of OHM has occurred at a property, that a response action has been undertaken at the site, and that the protectiveness of the cleanup relies upon restricting or eliminating certain types of activities and uses occurring at the site. Further, both the Grant and Notice are voluntary and designed for use by and at the discretion of private parties. However, the legal effects of a Grant and Notice differ significantly.

As described in Section 3.3 of this Guidance, a Grant of Environmental Restriction is a legally enforceable contract that conveys property interests to MassDEP. As such, present and future property owners, present interest holders who have subordinated their interests to the Grant, and future interest holders are legally required to abide by the terms of the Grant and its restrictions, easements and covenants. MassDEP, as the grantee or recipient of such interests, has the right to enforce the terms of the Grant if these terms are violated.

Use of a Grant requires MassDEP review and approval, and payment of associated permit fees. To obtain MassDEP's approval, the property owner must submit a Grant application to MassDEP in accordance with 310 CMR 40.1071 and 40.1072. The review involves a determination by MassDEP that the application is administratively and technically complete, but does not include a review of the adequacy of the response actions.

The procedures described in this Appendix are limited to the requirements specific to implementing Grants, but are not a complete description of the process. Many of the requirements outlined in the main sections of this Guidance apply to both Notices and Grants, and should be read in conjunction with this Appendix and the regulations.

### **AJ.1 Elements of a Grant of Environmental Restriction**

The Grant of Environmental Restriction (Form 1072A) identifies the subject parcel and specifies restrictions and requirements with which the property owner agrees to comply. The information required by a Grant is listed below in the order in which it appears in Form 1072A:

- The MassDEP Site Name (if there is one) and MassDEP Release Tracking Number(s);
- The date on which the Grant is signed by the property owner and the name and address of the property owner ("Grantor");
- First "Whereas" Clause - the name and address of the property owner and the municipality and county in which the parcel containing the area subject to the AUL is located (if the property owner is a corporation, the state of incorporation and the principal place of business should be included). The reference to the owner's source of title: for unregistered land, the deed book and page number; for registered land, the Certificate of Title number. If the owner inherited the property, the probate docket number should also be included;
- Second "Whereas" Clause – refers to the legal description, in metes and bounds, of the parcel containing the area subject to the AUL (which is attached as Exhibit A). If the land is unregistered, the Registry of Deeds recording reference for the survey plan showing the parcel is required in this clause. If the land is registered, the Land Court Plan reference is required;



- Third “Whereas” Clause (only included if the AUL applies to a portion of the parcel) refers to the legal description, in metes and bounds, of the portion of the parcel subject to the AUL attached as Exhibit A-1 and references the survey plan or Land Court Plan for the portion. For unregistered land, the Plan Book and Plan Number must be inserted; for registered land the survey plan of the portion is “a sketch plan attached hereto and filed herewith for registration”;
- Fourth “Whereas” Clause - establishes whether the area subject to the AUL is the disposal site or is a portion of the disposal site. This clause also refers to a sketch plan showing the boundaries of the area subject to the AUL in relation to the disposal site boundaries, which is attached to the AUL as Exhibit B;
- Fifth “Whereas” Clause - establishes that response actions taken at the site are based on restrictions on human access to OHM remaining at the property, and the restriction of certain activities occurring “in, on, through, over or under” the area subject to the AUL. This clause also establishes that the basis for the restrictions is the AUL Opinion (attached to the Grant as Exhibit C) and requires the date of the AUL Opinion;
- The next paragraph (that begins “NOW, THEREFORE...” ) establishes that the grant is a gift to MassDEP pursuant to section 6 of Chapter 21E. The term “QUITCLAIM COVENANTS” means that the grantor is passing whatever title and interest he or she has in the parcel within the limits of the grant and warrants that he or she has not encumbered the parcel during his or her term of ownership, yet makes no representation as to the state of title that preceded his or her term of ownership;
- Numbered sections:
  - “1. Restricted Uses and Activities” establishes the list(s) of Restricted Uses and Activities that may not occur “in, on, upon, through, over or under” the area subject to the AUL. These restrictions are based upon the AUL Opinion, which is attached to the Grant as Exhibit C. The restrictions place limits on uses (e.g., no residential use) and activities, including a prohibition against excavation [paragraph (iii)] and any action that is reasonably likely to result in significant risk or the disturbance of any cap or other cover over the Restricted Area;
  - “2. Permitted Uses and Activities” lists uses and activities that are allowed in the Restricted Area. The AUL Opinion supports these uses and activities. Clause (iii) of this section provides for an LSP evaluation of activities other than those listed (see *Section 6.1* of this guidance document on “Changes in Land Uses or Activities After an AUL Has Been Implemented”);
  - “3. Obligations and Conditions” lists specific conditions and obligations established in the AUL Opinion that have to be met to maintain a condition of No Significant Risk in the Restricted Area;
  - “4. Emergency Excavation” allows for emergency excavation in the Restricted Area (e.g., in order to repair utility lines or respond to a fire or flood) as long as specific conditions are met. The conditions are notifying MassDEP, limiting the degree of disturbance, undertaking listed measures to reduce risk, and engaging an LSP to oversee the activities and prepare a plan to restore the area following excavation;

“5. Easements” provides MassDEP, its agents, contractors and employees with a right of access across the parcel subject to the Grant to inspect the Restricted Area for the purposes of ensuring compliance with the AUL and conducting assessment activities;

“6. Severability” provides that if any provision of the AUL is later found to be invalid by a court or tribunal, the remaining provisions of the AUL will remain in effect. It also provides that the invalid provision shall be deemed automatically modified, or if it cannot be modified, it will be deemed deleted from the AUL;

“7. Enforcement” establishes that a violation of the terms of Grant could result in MassDEP enforcement actions, including the assessment of administrative penalties, or the issuance of civil or criminal penalties and/or “equitable remedies” by a court of law, including an order to remove or modify improvements that violate the terms of the Grant;

“8. Provision to Run with the Land” states that the terms of the Grant attach to the parcel, meaning that these terms remain in effect for the term of Grant regardless of whether the property ownership changes;

“9. Concurrence Presumed” is a formal acknowledgment by the Grantor that he/she agrees to the terms of the Grant and that he/she and any of his/her agents, contractors, subcontractors and employees will comply with its terms;

“10. Incorporation into Deeds, Mortgages, Leases and Instruments of Transfer” establishes that the property owner must either reference or incorporate the Grant in full into any subsequent deeds, easements, mortgages, leases, licenses, occupancy agreements or other instruments that transfer an interest in or right to use the property or restricted area. By signing the Grant, this agreement becomes legally binding. [Any lease, easement, etc. that is created after an AUL has been recorded or registered must either include a copy of the AUL or reference the AUL (by date, Registry, and instrument/Plan Book and Page Number or document number). This requirement is intended to ensure that people with legal rights to use the property, other than the owner, are aware of the existence of the AUL, the specific limitations placed on the use of the property, and conditions and obligations necessary to maintain No Significant Risk];

“11. Amendment and Release” specifies that the Grant may be amended or released and references 310 CMR 40.1080 *et seq.*, the MCP provisions that address changes in site use and activities after an AUL has been implemented and the procedures for amending or releasing an AUL;

“12. No Dedication Intended” establishes that the Grant is not intended to constitute a transfer of property ownership of the subject parcel or Restricted Area to MassDEP;

“13. Term” the Grantor indicates, by selecting the appropriate term, whether the Grant is “in perpetuity,” meaning continuing forever, or “for a period of \_\_\_ years.” In the latter case, the Grantor would indicate the appropriate number of years. In the majority of Grants, the Grant runs “in perpetuity,” unless it is released. Even when the term of a Grant has expired, it is still necessary to obtain from MassDEP a Release of Grant of Environmental Restriction;

“14. Rights Reserved” specifies that in accepting the Grant, MassDEP is not expressing approval as to the adequacy of the Grant or any response actions taken at the disposal site.

That is, MassDEP reserves its rights to pursue enforcement actions related to the area subject to the Grant;

- The notarized signature of the Grantor, the notarized signature and seal of the LSP, and finally, the signature of the Commissioner of MassDEP.
- Exhibits (*see Section 4 for detailed instructions for preparing these Exhibits*):

Exhibit A: a written legal description, in metes and bounds, of the parcel of land that contains the area subject to the AUL,

Exhibit A-1 (*only needed when the AUL applies to a portion of the parcel*): a written legal description, in metes and bounds, of that portion to which the AUL applies;

Exhibit A-2 (*only needed when the AUL applies to a portion of registered land*): a plan of the portion prepared by a Massachusetts Registered Land Surveyor;

Exhibit B: a sketch plan showing the boundaries of the area subject to the Notice in relation to the boundaries of the disposal site. (This plan does not need to be prepared by a Registered Land Surveyor);

Exhibit C: an AUL Opinion, in narrative form, written, dated, signed, and sealed by an LSP; and

Exhibit documenting signatory authority, if the individual signing the Grant is signing on behalf of an entity, rather than signing for oneself.

A Registry-certified copy of the Grant must be submitted to MassDEP using transmittal form BWSC-113. MassDEP must also be provided with a Registry copy of all survey plans referenced in the Grant.

## **AJ.2 Subordination Agreements**

The property owner must obtain subordination agreements from any holders of a prior interest in the Restricted Area or Property, as set forth in 310 CMR 40.1071(4). In a subordination agreement, the holder of a prior interest acknowledges and agrees that his or her interest is subject to the Grant of Environmental Restriction; therefore, he or she must comply with the terms of the Grant of Environmental Restriction when exercising such prior interest. Without a subordination agreement, a holder whose interest was created prior to the Grant of Environmental Restriction would not be legally obligated to comply with its terms.

Subordination agreements must be submitted to MassDEP as part of the Grant application package using Form 1072B, found at 310 CMR 40.1099. If the Restricted Area is a portion of a parcel, then subordination agreements must also be obtained from any interest holders in the parcel whose activities could be affected by the Grant (e.g., a utility easement on the larger parcel but not in the AUL area may allow utility workers to move equipment over the AUL area to reach the easement).

A subordination agreement should be recorded and/or registered immediately after the recording or registering of the Grant. If the land is unregistered, then the signed original Subordination agreement should be returned to MassDEP after it has been recorded. If the

land is registered, the signed original Subordination Agreement will be retained by the Registered Land section of the Registry of Deeds, and a certified copy should be forwarded to MassDEP.

### **AJ.3 Filing A Grant Application**

As part of the Grant application, the applicant must file three transmittal forms:

1. a Transmittal Form for Application and Payment (Form 50);
2. an Activity and Use Limitation (AUL) Transmittal Form BWSC-113; and
3. an Activity and Use Limitation (AUL) Opinion Form BWSC-113A. (See *Appendix H* for a list of AUL-related forms.)

It is important to obtain and submit as part of your Grant package the Application and Payment Transmittal Form in order to ensure proper crediting of your permit application fee.

#### **AJ.3.1 Grant Application Requirements**

A complete Grant Application must be submitted to MassDEP using transmittal form BWSC-113. The Grant application requirements are set forth in 310 CMR 40.1072, and include:

1. A completed Form 1072A set forth at 310 CMR 40.1099, including the exhibits described above.
2. Any necessary subordination agreements using Form 1072B set forth at 310 CMR 40.1099;
3. A title certification issued to MassDEP by an insured title examiner certifying title in the Grantor, and copies of any outstanding record encumbrances (e.g., mortgages, easements, liens) and any plans of record. (See *Appendix K*, “*Sample Title Certification*”) and;
4. A check in payment of the permit application fee submitted with a “Transmittal Form for Application and Payment,” (available from MassDEP offices). The permit code for this transmittal form is BWSC 40. See Section AJ.5, below.

### **AJ.4 MassDEP Review of a Grant**

Once a Grant has been prepared, it must be submitted to MassDEP for review, accompanied by a title certification, copies of outstanding encumbrances, plans of record, and the applicable permit application fee (see *Section 5.2*). The review performed by MassDEP has two steps (see MassDEP’s Fee Regulations, 310 CMR 4.04(10)):

***NOTE TO REVIEWERS: The permit review timeframes have been changed to reflect the amended permit review timeframes in the revised fee regulations, 310 CMR 4.00, which resulted in a 20 % reduction in permit review timeframes across all MassDEP programs. The MCP will be revised to be consistent with the fee regulations.***

#### **Step 1: Administrative Completeness**

The initial review determines whether the application is complete; that is, whether all necessary documents have been submitted to MassDEP. Such documents include the signed original of the Grant and any associated documents, such as subordination agreements, survey plans, title certification, title documents and any corporate votes and Certificates of Incumbency. The timeframes for the permit application review are provided in 310 CMR 4.10(g), Timely Action and Fee Provisions. MassDEP must conduct this review within 24 days after it receives the submittal. If

the submittal is incomplete, MassDEP provides the party filing the Grant application with a written notice of deficiencies and 30 days within which to provide the missing information. Failure to provide this missing information within this time frame is considered a withdrawal of the application. (Note: These time frames may be changed by mutual written consent of MassDEP and the applicant.)

A second administrative completeness review is conducted for the supplementary material in which MassDEP determines that all necessary material has been submitted. MassDEP will not review or process an incomplete application.

## **Step 2: Technical Review**

This stage involves a review of the Grant documents, survey plans and title certification to determine whether they are correct as to substance and form. MassDEP has 48 days in which to conduct this review. If the submittals are found to be satisfactory, then MassDEP will approve the Grant application. If there are technical deficiencies, MassDEP will send a written notice of the deficiencies to the party filing the Grant application. A second technical review takes place upon submission of the supplementary material. MassDEP has 36 days from the day after receipt of the supplementary material to complete the review. This review is limited to the sufficiency of documents and not the sufficiency of the response action. A decision to approve or not approve the Grant is made upon completion of the second technical review (or the first if no supplemental information was needed). MassDEP then sends a written statement indicating whether the Grant has or has not been approved to the applicant. (Note: These time frames may be changed by mutual, written consent of MassDEP and the applicant.)

Once MassDEP staff decides that the Grant can be approved, the Grant is forwarded to MassDEP Commissioner for approval and signature. Once the Commissioner has signed the Grant, MassDEP will return it and any other associated documents, plans and subordination agreements to the applicant so that they may be recorded and/or registered. The Grant does not become effective until it has been recorded or registered.

## **AJ.5 Grant Fee Requirements**

The permit application fee for MassDEP's review of the Grant is set forth in MassDEP's fee regulations at 310 CMR 4.04(10)(4)(g). The permit application fee is **\$1050** [see 310 CMR 4.10(10)(g)]. A permit applicant may apply for consolidated review of multiple Grant or Private Well Grant applications and a special fee if the application meets the following criteria [see 310 CMR 4.10(10)(g)(4)(b)]:

1. the application covers Grants for 6 or more separate parcels which comprise, in whole or part, a single disposal site;
2. each of the proposed Grants references a single AUL Opinion in accordance with 310 CMR 40.1071(2)(f); and
3. the inconsistent and consistent activities and uses, and the obligations and conditions stated in the respective Grants are identical for each of the parcels.

With respect to consolidated Grant applications, MassDEP must refund any portion of a permit application fee that exceeds the agency's actual costs for review and approval. 'Mass's costs are calculated by applying the method used to calculate Response Action Costs in 310 CMR 40.1220(1) and the Indirect Rate set forth in 310 CMR 40.1221(2). Regardless of MassDEP's



actual review costs, the fee for reviewing a consolidated application for multiple Grants cannot be less than \$1050, and cannot exceed \$6,000.

#### **AJ.6 Recording and/or Registering the Grant**

After the Grant has been reviewed by MassDEP and signed by the Commissioner, the Grant is recorded and/or registered within 30 days of the property owner's receipt of a MassDEP approved Grant. The property owner must then submit a certified registry copy of the recorded Grant bearing the book/page, instrument number, and or document number and survey plans bearing the plan book /plan number within 30 days of recording or registering the Grant. Additionally, the property owner must comply with the public involvement requirements at 310 CMR 40.1403(7).

#### **AJ.7 Amending and Releasing a Grant**

Amendments and Releases of Grants must be reviewed and approved by MassDEP, generally this process follows the steps described above for review of the original Grant in accordance with the timeframes in 310 CMR 4.10(h) and (i), respectively. The permit application fee for MassDEP's review of an Amendment of Environmental Restriction is **\$850**; and the permit application fee for a Release of Environmental Restriction is **\$650**.

Once approved, Amendments and Releases must be recorded and/or registered with the appropriate Registry of Deeds, and a Registry-certified copy of the amendment, including instrument and/or book and page number, and/or document number must be submitted to MassDEP within thirty days of its recordation and/or registration. As with the original Grant, the Amendment must comply with the public involvement requirements set forth at 310 CMR 40.1403(7). (See Section 5.4)

##### **AJ.7.1 How to Amend a Grant**

Amending a Grant requires the use of the Amendment to Grant of Environmental Restriction Form 1082A set forth at 310 CMR 40.1099. The following documents must be attach to Form 1082A: a written legal description of the parcel (Exhibit A); an AUL Opinion (Exhibit B) explaining the proposed changes in Site Activities and Uses and how those changes are consistent with the requirement to maintain No Significant Risk; and BWSC-113A. The AUL Opinion must be prepared, signed and sealed by an LSP in accordance with 310 CMR 40.1082. The amendment application must also include a title certification, copies of pertinent instruments and plans, and payment of an application fee. If applicable, subordination agreements must be obtained using Form 1072B set forth at 310 CMR 40.1099. It is also necessary to include in the application a Transmittal Form for Application and Payment and BWSC Forms 113.

##### **AJ.7.2 How to Release a Grant**

Releasing a Grant requires the use of Form 1083A, Form 1084A, or Form 1084E, set forth at 310 CMR 40.1099. depending on the nature of the Release: Form 1083A is used for Partial Release of the Grant, pursuant to 310 CMR 40.1083(2); Form 1084A is used when the Release is based upon an LSP Opinion stating that the Grant is no longer necessary to maintain a condition of No Significant Risk [310 CMR 40.1083(a)]; and Form 1084E is used when additional response actions are necessary to support a conclusion that a condition of No Significant Risk has been achieved or that all Substantial Hazards have been eliminated [310 CMR 40.1083(c)].



A written legal description of the parcel (Exhibit A), an AUL Opinion prepared by an LSP (Exhibit B), and BWSC-113A must be attached to the Release and the applicable fee must be submitted in accordance with 310 CMR 40.1083 and 310 CMR 4.10(i). The Transmittal Form for Application and Payment and BWSC-113 must be used to submit the application to MassDEP.

DRAFT

**APPENDIX K: SAMPLE TITLE CERTIFICATION FOR GRANT OF  
ENVIRONMENTAL RESTRICTION**

[FIRM LETTERHEAD]

\_\_\_\_\_,20\_\_

Commonwealth of Massachusetts, Acting by  
and through its Department of Environmental Protection  
One Winter Street  
Boston, MA 02108

RE:[BRIEF DESCRIPTION OF PROPERTY TOGETHER WITH DEED REFERENCE]

Ladies/Gentlemen:

We have examined the records of the \_\_\_\_\_ Registry of Deeds with respect to the above-described premises for a period of at least fifty (50) years through \_\_\_\_\_ [DATE] \_\_\_\_\_, at \_\_\_\_\_ [TIME] \_\_\_\_\_, [INSTRUMENT NO.] \_\_\_\_\_. We certify, that at such time, \_\_\_\_\_ [NAME OF PARTY HOLDING TITLE] \_\_\_\_\_, held good, clear, record and marketable title to the above premises, free from all encumbrances which would materially affect the title, except the following matters which are not covered by our title examination and which may materially affect the title:

**NOTE:** We do not certify as to violations of subdivision controls or planning board regulations; conservation commission and environmental control questions, if any; zoning; bankruptcy and creditors' rights; accuracy of descriptions of surveys; rights of parties in possession; any matters which would be disclosed by an accurate survey and inspection; whether or not restrictions have been violated; disposition agreements of any Redevelopment Authority; pending federal liens not of record; usurious provisions, variable rates repayment or rewrite provisions of mortgages; Indian tribal land claims; validity of corporate or other type entity existence; errors or omissions in indexing at the Registries of Deeds and probate (including computer errors or omissions); unpaid taxes, municipal assessments or any other matters not of record at the Registry of Deeds or Registry of Probate or to subsequent owners. Liability is limited to matters appearing of record during the period of the examination, and only to the parties to whom the certificate is issued. This certificate does not cover Chapter 963 Acts of 1973 (re: abandoned railroad beds) or provisions of M.G.L. Chapter 21E (Superfund Statute). No liability is assumed for obtaining releases, discharges or any other instruments noted below.

**ENCUMBRANCES:**

[LIST ALL MATTERS AFFECTING TITLE - THE DESCRIPTION OF THE ENCUMBRANCE SHOULD INCLUDE THE DATE OF THE DOCUMENT OR PLAN AS WELL AS A BOOK AND PAGE REFERENCE. ADDITIONALLY, COPIES OF ALL DOCUMENTS SHOULD BE INCLUDED WITH CERTIFICATION]

This certification relies upon [DESCRIPTION OF PLAN, INCLUDING RECORDING INFORMATION] for the accuracy of the description.

The certifications set forth above are solely for your benefit in connection with an application for a Grant of Environmental Restriction and are issued pursuant to the provisions of 310 CMR 40.1072(2)(c). These certifications may not be furnished to any other person or entity or relied upon by you for any other matter, nor by any other person or entity in any manner.

Very truly yours,  
[NAME OF LAW FIRM OR TITLE COMPANY CERTIFYING TITLE]